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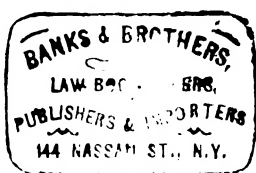
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REPORTS OF CASES
DECIDED
IN THE
COURT OF COMMON PLEAS
OF
UPPER CANADA;

FROM HILARY TERM 18 VICTORIA, TO HILARY TERM 19 VICTORIA.

BY
EDWARD C. JONES, ESQUIRE,
BARRISTER-AT-LAW.

VOLUME V.

TORONTO:
HENRY ROWSELL.

1856.

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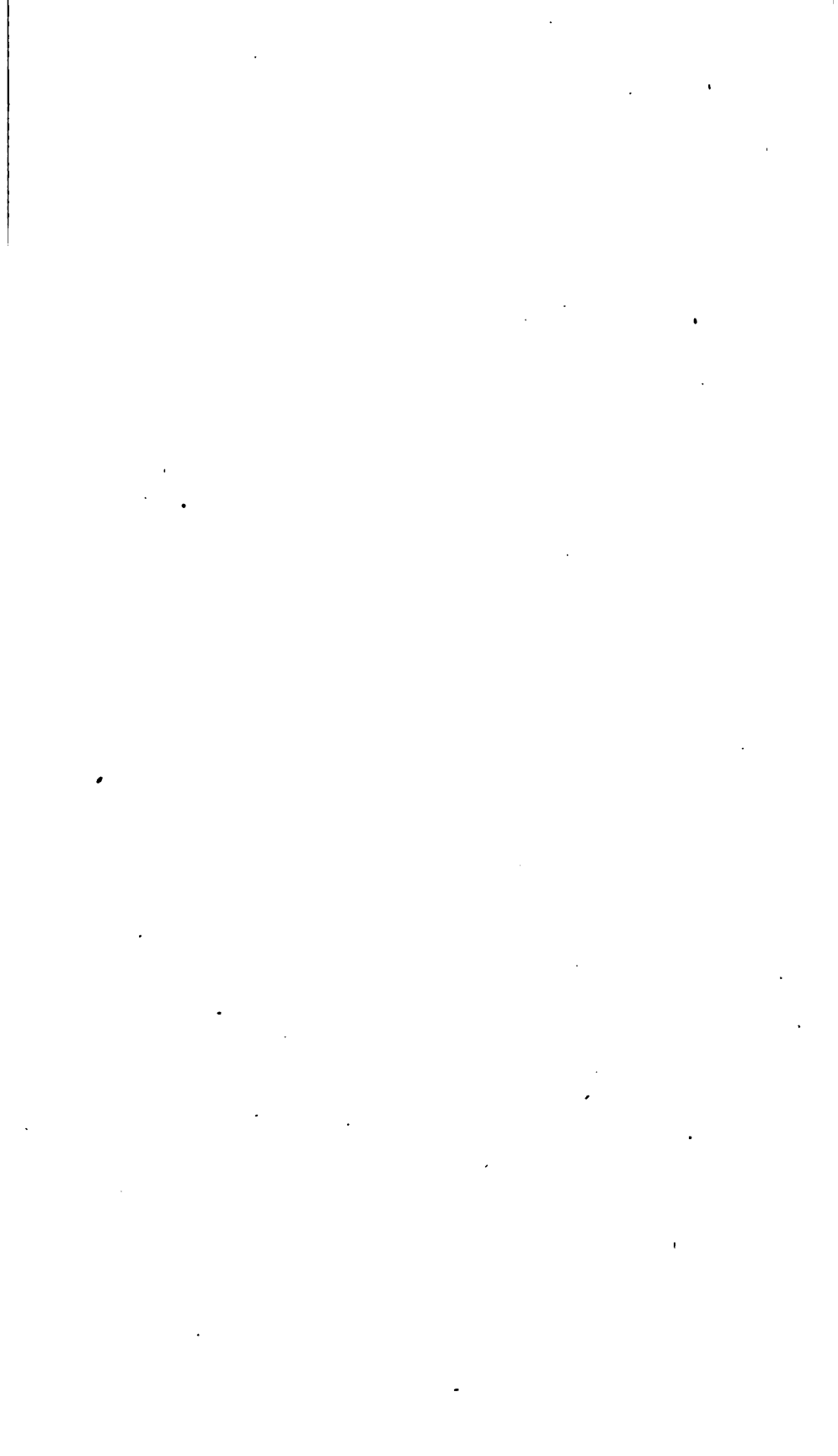
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J U D G E S
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JAMES BUCHANAN MACAULAY, C. J.

" " ARCHIBALD McLEAN, J.

" " WILLIAM BUEL RICHARDS, J.



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REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS.

HILARY TERM, 18 VICTORIA.

Present—The Hon. J. B. MACAULAY, C. J.

“ A. McLEAN, J.

“ W. B. RICHARDS, J.

LEONARD V. WALL.

Agreement—Construction of.

A., by agreement in writing, sealed, &c., in consideration of the rents, covenants, and agreements on the part of B. to be paid, done, and performed, did contract and agree with the said B. that he should and would, on or before the 1st day of October, *upon request made to him in writing under the hand of the said B., grant and execute unto the said B. a good and effectual lease, to be prepared or approved by the counsel of B. of all, &c., to hold for five years, at, &c., the said lease and counterpart thereof to contain certain covenants, &c.:* and said A. thereby agreed to deliver to the said B., on the 1st of October, staves, &c., at the above premises, at, &c., per thousand, for which said B. agreed to pay said A. therefor at, &c.: and it was thereby agreed that there should be inserted in said lease a covenant, on the part of the said A., that he would deliver to the said B., in each of the two succeeding years staves, &c., payable, &c.: and it was further agreed that said B. should furnish C. and D. as securities for the due performance of the above agreement on or before the 20th day of July.

Held, that a request in writing under the hand of B. for such lease, or the granting of such lease by A., is not a condition precedent to the right of B. to have the staves, &c., delivered at the time and place mentioned in the agreement, the covenants to grant the lease and to deliver the staves being separate and independent; and that a declaration on the covenant to deliver the staves, &c., without averring a request for or a grant of the lease, is good on general demurrer. *Held*, also, that the declaration, containing an averment that the time for the giving of the security had elapsed before the making and delivery of said agreement, and that plaintiff was ready and willing, within a reasonable time after the making and delivery of said agreement, to furnish the said security, and from thence hath been, &c., is good on general demurrer. *Held*, also, that the second count is bad on general demurrer, the day laid not corresponding with the agreement as set out on oyer, and because readiness and willingness on the part of the plaintiff to furnish the securities mentioned in the agreement is not averred.

Writ issued 14th of January, 1854; declaration, 11th of April, 1854.

COVENANT.—*First count* states that heretofore—to wit, on the 21st of July, 1852—defendant, by certain articles of agreement then made between defendant, of the one part, and the plaintiff of the other part, which said articles of agreement, sealed with the seal of the defendant, the plaintiff makes profert, did covenant and agree to and with the plaintiff, among other things, that he (the said defendant) would deliver to the plaintiff, at the premises of the defendant, two hundred thousand good merchantable machine staves, jointed, at twenty-five shillings per thousand, likewise fifty thousand pieces of heading at twenty-two shillings and six pence per thousand, on the first day of October then next, and fifty thousand hoops, at twenty-two shillings and six pence per thousand, net count, by the fifteenth of November then next; and said plaintiff did thereby agree to pay said defendant therefor the said prices at three, six, nine, and twelve months from the said 1st of October, and to furnish James Laing and Daniel Leonard as securities for the due performance of the said agreement on or before the 20th of July, 1852; then avers that the 20th of July, 1852, had elapsed before the making and delivery of the said articles of agreement, and plaintiff could not furnish said Laing and Leonard as securities for the due performance of said agreement; and, although plaintiff was ready and willing, within a reasonable time after the making and delivery of the said articles of agreement, and from thence until and after the said 15th of November, 1852, and from thence hitherto hath been ready and willing to furnish said Laing and Leonard as securities for the due performance of said agreement by plaintiff—and although plaintiff was ready and willing to receive the said staves, &c., at the premises of defendant on the said 1st of October then next, and said hoops on the 15th of November then next, and to pay for the same at the prices aforesaid at three, six, nine, and twelve months, yet defendant did not, nor would deliver the said staves, &c., or any part thereof, to plaintiff, and did not, nor would deliver the said hoops, or any part thereof, at said premises, by said 15th of November then next; but, &c., contrary, &c.

Second count states, that whereas also defendant heretofore

—to wit, on the 21st day of July, 1852—by certain other articles of agreement then made between plaintiff of the one part and the defendant of the other part, of which said articles of agreement, sealed with the seals of defendant and plaintiff, profert is made, did covenant and agree with plaintiff that he (defendant) would deliver to the plaintiff, at the premises of defendant, staves, pieces of heading, and hoops, of the number, at the prices, and on the days mentioned in the first count; and plaintiff did thereby agree to pay said defendant therefor said prices at three, six, nine, and twelve months from the said 1st of October; and although plaintiff was ready and willing to receive the said staves, &c., at the premises of defendant on the said 1st of October then next, and the said hoops on the said 15th of November then next, and to pay for the same the prices aforesaid at three, six, nine, and twelve months as aforesaid; yet defendant did not, nor would deliver the said staves, or any part thereof, to plaintiff, and did not, nor would deliver said hoops, or any part thereof, at said premises by the said 15th of November then next; but, &c., contrary, &c., by means whereof plaintiff hath been deprived of the benefit and advantage that would have accrued to him from the obtaining of the said staves, &c., and hath lost divers gains, &c., to the damage of plaintiff, &c.

Oyer having been demanded, the agreement was set out as follows:—

“Articles of agreement made the 12th of July, 1852, between Patrick Wall, of the one part, and Richard Leonard, of the other part.

“The said Wall, in consideration of the rents, covenants, and agreements hereinafter mentioned on the part of the said Leonard to be paid, done, and performed, doth hereby contract and agree with the said Leonard that the said Wall shall and will, on or before the 1st day of October, 1852, upon request made to him in writing under the hand of the said Leonard for that purpose, grant and execute unto the said Leonard, his executors, administrators, and assigns, a good and effectual lease, to be prepared or approved of by the counsel of the said Leonard, of all those premises, being the cooper's shop, shed, and store-houses and stove-yard, extending from the north limit of the premises owned by Wall to the southerly limit of the cooper's shop, and ex-

Seventh, to *second count*—That no lease or demise of the said premises in said articles of agreement mentioned was ever tendered or offered to the defendant by or on behalf of the plaintiff for execution, nor was any such lease ever made or executed by the defendant, nor were the said premises therein mentioned ever demised to or vested in the defendant in manner and for the purposes therein mentioned, nor did plaintiff at any time before the time appointed for the delivery of the said staves, &c., furnish the said Laing and Leonard as securities for the due performance of the said agreement by the plaintiff; wherefore defendant saith that he did not deliver the said staves, &c., at said premises, as in said second count mentioned; concluding with a verification.

Replication.—*Similiter* to first plea.

To second plea to first count—Demurrer, on the grounds that the plea is no answer to the cause of action in said first count mentioned; that it attempts to raise an immaterial issue, and to make the request of plaintiff to defendant to deliver the lease therein mentioned a condition precedent to the performance by defendant of the covenant in said first count mentioned.

To third plea to first count—On the grounds that said plea alleges that plaintiff did not furnish Laing and Leonard as securities, &c., and attempts to raise an issue thereon,—the plaintiff having averred in said first count that the time by which the securities were to be furnished had elapsed before the making and delivery of the said agreement, and that plaintiff was ready and willing at all times afterwards to furnish such securities, and so defendant traverses a matter not alleged; that the plea concludes to the country instead of with a verification, and attempts to raise an immaterial and too large an issue.

To fourth plea to first count—On the grounds of multiplicity in alleging that no lease or demise of the premises was ever tendered to defendant for execution on behalf of plaintiff, and also that said premises were never demised to or vested in plaintiff, and also that plaintiff did not furnish security for the performance of said agreement; that said plea is no answer to the said first count, the matters therein alleged not

being conditions precedent, and for that the plea attempts to raise an immaterial issue.

To fifth plea to second count—On the grounds that it is no answer to said declaration, the matters therein alleged not being conditions precedent to the performance by defendant of the covenant in the said second count mentioned; that the plea is double and multifarious, in alleging that defendant was not requested in writing to make or deliver a lease, that no lease was tendered, and also that no lease was made by defendant,—thereby stating three distinct answers to plaintiff's cause of action.

To sixth plea to second count—On the ground that the plea alleges that plaintiff did not furnish the securities for the performance of the agreement by plaintiff, and attempts to raise an issue thereon, the plaintiff having averred that the time by which the securities were to be furnished had elapsed before the making and delivery of the agreement, and so defendant traverses a matter not alleged, and concludes to the country instead of with a verification, and does not deny plaintiff's readiness and willingness to furnish the said securities, and is no answer to the said first count, the furnishing the securities not being a condition precedent to the performance of defendant's covenant.

To seventh plea to second count—On the grounds of duplicity in alleging that no lease or demise of the premises was ever tendered to defendant for execution, and also that said premises were not demised to or vested in plaintiff, and that plaintiff did not furnish security for the performance of the agreement; that said plea is no answer to the second count, the matters therein alleged not being conditions precedent to the performance by defendant of the covenant in said second count mentioned.

The demurrer was argued during last Michaelmas term, when the following exceptions were taken to the first count of the declaration, on the grounds—

First, That the creation of the tenancy and demise of the premises in the agreement mentioned, and the finding of security, are conditions precedent to the delivery by defendant of the staves, &c., and that unless said demise had been made the said articles were not to be delivered.

Second, That said first count is inconsistent and insensible, being a condition to give certain security by a day therein specified, which day is averred to have elapsed before the actual delivery of the agreement.

Third, That said agreement contains a stipulated penalty on either party for breach of the same, and that plaintiff's action should have been confined thereto.

Fourth, That said first count affects to treat the non-delivery of said articles by defendant as covenants wholly independent of any demise, or giving of security, or other essential acts in said agreement concluded.

To second count, on grounds similar to the first and third to the first count.

McMichael, for plaintiff, contended that the covenant sued on is entirely an independent one; that the covenant can be fulfilled whether the premises are in the possession of the plaintiff or defendant; and that the staves, &c., were to be delivered before the lease was given, the giving of which was not a condition precedent to the delivery of the staves, &c., on the days mentioned. He referred to *Dawson v. Dyer*, 5 B. & A. 584; *Campbell v. Jones*, 6 Term Rep. 571; *Smith v. Shellberry*, 2 Mod. R. 34.

Hagarty, Q. C., for defendant—That the contract to deliver the staves, &c., is only binding on the relation of landlord and tenant having been created; that plaintiff cannot ask the defendant to perform his contract, which was a portion of a contract, the other portion of which was not performed by the plaintiff himself—*The Duke of St. Alban's v. Shore*, 2 H. B. 270; *Graves v. Legg*, 23 L. J. 254. That the objections to the pleas of duplicity are untenable; that the pleas contain a statement of facts which, together, form one proposition—*Bell v. Tucker*, 3 M. & G. 785. That when *de injuria* would be a good answer, as it would be in this case, there is no duplicity—*Thomas v. Watkins*, 4 Eng. Rep. 489; *Peters v. Daniel*, 5 C. B. 568.

MACAULAY, C. J.—The declaration being excepted to as upon general demurrer, the first consideration is, whether it be good in law. The two counts differ materially; it is proper, therefore, to take them separately.

First, as to the first count: The first objection to it is, that it does not aver the creation of the tenancy and demise mentioned in the agreement, and that such demise was a condition precedent to the plaintiff's right to the staves, &c. The second and third, I think, are unimportant: the third is virtually included in the first. If the demand of a lease by plaintiff was a condition precedent or concurrent, it is not averred nor excused; nor is defendant's refusal to grant or execute a lease alleged. The declaration treats that part of the agreement respecting the lease as independent; and, consistently with the declaration, a written demand of a lease may have been made and a lease refused, or a lease may have been offered by the defendant and refused by the plaintiff, or nothing may have been done in relation thereto on either side.

The agreement is a deed-poll dated the 12th of July, 1852, but not executed until after the 20th of July, 1852, though apparently before the 1st of October of that year, and made between the defendant of the one part and the plaintiff of the other part, whereby defendant, in consideration of the rents, covenants, and agreements thereafter mentioned on the part of plaintiff, to be paid, done and performed, agreed with plaintiff that he (defendant) would, on or before the 1st of October, 1852, upon request made to him in writing under the hand of the plaintiff for that purpose, grant and execute unto the said plaintiff, his executors, &c., a good and effectual lease, to be prepared or approved of by the counsel of said plaintiff, of all, &c., being the cooper's-shop, shed, and store-houses and stove-yard therein mentioned, &c., to hold for five years from the 1st of October then next, at forty pounds yearly rent, payable quarterly, &c.

Assuming that agreement to have been executed before the 1st day of October, 1852—to wit, on the 21st day of July, 1852—as alleged, it appears that the defendant expressly covenants to grant and execute a lease to the plaintiff, on or before the 1st of October, upon request made to him in writing under the hand of the plaintiff, said lease to be prepared or approved of by the plaintiff's counsel. The plaintiff does not expressly covenant to accept such a lease, though it may be implied from the terms of the contract. The defend-

ant, in effect, contends that the plaintiff agreed or was bound to request a lease in writing, prepared or approved of by his counsel, on or before the 1st of October, or at all events before he could claim delivery of the staves, &c., which the defendant had engaged to deliver on the 1st of October and the 15th of November respectively.

It is consistent with the agreement that the defendant, upon request in writing, would be bound to prepare a lease for the approval of plaintiff's counsel unless prepared by plaintiff's counsel; it does not say the plaintiff was to prepare the lease, and the question is, whether he was bound to request one on or before the 1st of October, 1852. The plaintiff might have requested such lease immediately after the execution of the agreement; and had it been so executed on the 12th of July, or if it was in fact executed on the 21st, or any other day prior to the 1st day of October, and the lease been demanded immediately, the defendant would have been bound forthwith to grant and execute such a lease as plaintiff's counsel should prepare or approve, unless the agreement gave him until the 1st of October to do so; if it did not, it would follow that a lease might have been required, and have preceded the 1st day of October and plaintiff's right to the staves, &c.—*Heard, assignee, &c. v. Wadham* (1 East, 619, Carth. 124), *Seaward v. Willcock* (5 East 198). And, at all events (especially considering that each is bound to the other in a penalty of fifty pounds), the defendant, if not himself bound to call on the plaintiff to name his counsel and to be ready with the lease prepared or executed by him by the 1st day of October, was not entitled to rely upon the plaintiff's not making a request in writing as entirely exonerating him from doing anything under the agreement.

The plaintiff did not agree to make a request in writing at any specific time; and what he should do to entitle himself to sue for a breach of that part of the agreement is not now the question. What he did agree to do was to furnish the securities named for the due performance of the agreement on his part; and he avers that he was ready and willing, within a reasonable time after the execution of the agreement, and from thence until and after the 15th of November, and hitherto

hath been ready and willing, to furnish the said James Laing and Daniel Leonard securities for the due performance of the said agreement by him. He does not aver notice thereof to defendant, nor is it made a ground of special demurrer that he has omitted to do so.

The defendant, in effect, agrees, under a penalty of fifty pounds, on or before the 1st of October, 1852, to grant and execute to plaintiff a lease, to be prepared or approved of by his (plaintiff's) counsel, upon request made to defendant in writing under the plaintiff's hand for that purpose. I am disposed to think that when plaintiff so requested he would be bound to name his counsel to approve or to tender a lease prepared by him, and that defendant was entitled to know whether the plaintiff intended to prepare a lease, or only to name the counsel to approve of one prepared by defendant; and of course *preparation* would include *approval* of the lease.

Had the agreement been executed on the day of its date, and the plaintiff furnished the securities at the day therein mentioned, and yet failed to request a lease, &c., before the 1st of October, I do not see that defendant would have been excused from delivering the staves, &c. He knew he was bound to be ready with them on the days specified, and might probably have made the acceptance of a lease conditional by taking the initiative; but that he does not allege. Nor do I see that defendant could maintain against the plaintiff an action of covenant, or for the penalty, for not having made the request in writing on or before the 1st of October.

So far as the agreement goes, it seems to me one of those cases in which either party wishing to proceed might take the first step, and hasten the other—that is, the plaintiff by requesting, or the defendant by tendering a lease, or calling on the plaintiff to name his counsel to approve of one without request. My present opinion is, that the clause respecting security was not void *in toto*, nor to be regarded as abandoned; but that on general demurrer, and in relation to the breach assigned, the plaintiff has sufficiently shewn readiness, &c., to furnish the same, and that the first count is good.

As to the second count, the agreement as set out on oyer, whereby it becomes part of the declaration, varies from the

day laid in that count as the day on which it was made, without anything to explain the variance. There is nothing stated in that count to shew that the agreement therein declared on was not in fact executed on the day it bears date, or that it was executed after the day appointed for furnishing the securities. And the date on oyer does not correspond with the day stated in the declaration. Its being laid under a *videlicet* does not obviate the objection; for the day laid imports the day of the date, and when exhibited on oyer the real date does not correspond; and if identity was nevertheless to be presumed, the presumption must be that the agreement was sealed and delivered on the 12th of July; and that day was prior to the time appointed for the plaintiff's giving security for the performance of the agreement on his part. Such day preceding the periods appointed for delivering the staves, &c., the furnishing the securities formed a condition precedent, and performance thereof ought to have been averred or excused. If not a condition precedent, it certainly was one concurrent; and the furnishing securities on the one hand, and the delivery of the staves on the other, being dependent, readiness and willingness on the plaintiff's part ought to have been averred; and not being alleged, I think this count must be bad on general demurrer.

It appears to me the pleas demurred to are all bad. The second plea treats a request in writing under the hand of the plaintiff, calling on the defendant to grant and execute a lease, or the tender of a lease, for execution, or the making thereof by the defendant, as a condition precedent to or concurrent with the defendant's obligation to deliver, or the plaintiff's right to demand the staves, &c., mentioned in the declaration on the 1st of October and 15th of November respectively; whereas I do not think such the correct construction of the agreement.

A lease might have been demanded before either of those days; and if no lease was executed by the defendant, as alleged in the last allegation of the plea, it was his own fault. Though not incumbent upon him to have done so without being requested in writing, he might have prepared and tendered one for approval, and if approved, have executed it.

He does not state that the plaintiff refused to name his counsel to approve, or prevented or discharged the defendant from granting a lease.

As to the first and second branches of the plea, the plaintiff does not bring this action for, nor complain of, the non-execution of a lease as constituting a breach of contract on defendant's part; and if a request in writing was a condition precedent on the plaintiff's part to entitle him to bring the present action, the first count of the declaration would be bad for he neither avers nor excuses it; and I have already said I do not consider it bad on that ground.

In strictness, the plaintiff's covenants and agreements, and not their performance, constitute the consideration for the defendant's covenants. The lease and the rents to be reserved therein were prospective. The defendant bound himself to execute a lease on or before the 1st of October, 1852, upon the request in writing of the plaintiff, whose counsel was to prepare or approve of the instrument. It might be requested before that day. Whether the defendant would be entitled to delay the execution until the 1st of October arrived, is a question not now to be considered. If the plaintiff failed to make the request on or before that day, it may be that time was so far of the essence of the contract at law that he could not maintain an action of covenant against the defendant for refusing to execute a lease afterwards. But consistently with this, the defendant, if eager to proceed, might have tendered such a lease at the day as he considered himself bound to grant, and entitled to call upon the plaintiff to accept. If not, and if discharged by the plaintiff's laches from granting a lease, I do not think it a good defence to another, and what I consider an independent branch of the defendant's agreement—to deliver the staves, &c., which he was bound to be in readiness to do, on the 1st of October and 15th of November, but which he does not say he was prepared to deliver, excusing his non-readiness by alleging the plaintiff's failure to request or tender, and his own omission or neglect to grant or execute a lease.

If the defendant was not ready with the staves, to what purpose should the plaintiff be bound to tender a lease to

entitle him to demand or receive what the defendant does not shew himself in a situation to have performed, and to which the plaintiff was entitled, although he might have waived or declined or neglected calling for a lease before or on the 1st of October. It may be said that readiness on the defendant's part was not necessary to be averred, because admitting that he was not ready, his defence is, that the plaintiff fails to shew performance of that on his part which was a condition precedent or concurrent, without which he could not call upon the defendant to perform his part of the agreement. If strictly conditional, it might be so ; still the defendant is by this plea excusing the non-performance complained of by the plaintiff, by alleging the omission of the plaintiff to call for, and of himself to grant a lease. If the defendant was not bound to grant it without a written request and the tender of a lease for execution, and it was in the plaintiff's discretion to make the request at his pleasure, or to delay it indefinitely, his omission to make such request on or before the 1st of October or 15th of November, 1852, would not amount to a discharge of the defendant from delivering the staves on those days respectively.

Could the defendant after the 1st of October have maintained an action against the plaintiff for not having requested or tendered a lease for execution, without alleging readiness to perform all he undertook to perform on that day, or alleging by way of special damage readiness to deliver the staves, &c., without adding an offer thereof, or alleging a refusal by the plaintiff to accept them? I am disposed to think that in that case and in this his statement is incomplete, without averring his own readiness or offer, and shewing a failure on the plaintiff's part to accept a lease, or to secure or pay for the staves, so as to shift the first breach upon the plaintiff, and to justify the defendant in withholding performance on his own. The best opinion I can form therefore, is, that the matter set forth as a defence in this plea does not shew failure in the plaintiff to perform that which was a condition precedent or concurrent on his part.

The third plea is bad, for concluding to the country after denying facts not alleged by the plaintiff. The plaintiff

asserts that he was ready and willing to furnish the sureties named. The defendant pleads that he did not furnish them, and then concludes to the country. A distinct issue is not raised by this mode of traverse.

If, owing to the delivery of the agreement after the 20th of July, the words "on or before the 20th of July, 1852," are to be rejected as inapplicable, leaving it a mere agreement to furnish such security in a reasonable time, and at all events concurrently with the delivery of the staves, &c., the plaintiff alleges his readiness and willingness to furnish the security, and the defendant's neglect and refusal to deliver the staves, &c. The defendant does not aver that he was ready on his part, or that the plaintiff was not ready and willing as he alleged; but avers that the plaintiff did not secure him, as provided for by the agreement; concluding to the country—*Boyd v. Lett* (1 C. B. 222), *Giles v. Giles* (9 Q. B. 164), *Wallis v. Warren* (4 Ex. R. 361), *Spartali v. Benecke* (10 C. B. 212), *The Great North of England Railway Co. v. Harrison* (12 C. B. 576), *Bonzi v. Stewart* (7 M. & G. 757), *Poole v. Hill* (6 M. & W. 837), *De Medina v. Norman* (9 M. & W. 821).

I do not see, if plaintiff was ready and willing to furnish the security, that he was bound to do more—that is, actually to furnish or give it (and no special mode of doing so is provided for) if the defendant was not ready and willing on his part. If the plaintiff was ready and willing to furnish the two persons named to join him in securing payment, he furnished them, so far as respected the staves to be delivered in October and November, 1852. If the defendant knew it, they might all three have joined in promissory notes payable to the defendant in three, six, nine, and twelve months. Consistently with this plea, a lease may have been executed, and then default in giving the securities would have gone to a part only, and not to the whole consideration on either side; and for that reason would be insufficient to bar the plaintiff's action.

The fourth plea seems to be the second and third united, and bad for duplicity—*Wright v. Watts* (3 Q. B. 89). If bound at all, the plaintiff was not bound to furnish the securities at any time before the time appointed for the delivery of the staves, &c. He alleges readiness, &c., within a reason-

able time after the agreement and at the days. The defendant does not deny such readiness within a reasonable time, unless argumentatively, and if ready at the day it would be sufficient.

The plea alleges—first, that no lease was tendered for execution; second, that no lease was made by the defendant, nor the premises demised to or vested in the defendant (meaning plaintiff), &c.; third, that the plaintiff did not at any time before the time appointed, &c., furnish, &c. Consistently with all this, the plaintiff may have been ready to furnish the security and accept delivery, and the defendant may have refused to execute a lease or to deliver the staves, &c. He does not allege his readiness or willingness to do either.

I have said I did not consider the written request or tender of, or the making of a lease, a condition precedent or concurrent; and if not, the plea is bad; and if the clause respecting security is not void or abandoned, I do not consider it more than a concurrent act, and that readiness and willingness is sufficient to have been averred by the plaintiff.

I have tried to test the first count, and the pleas thereto, by supposing the defendant to have tendered the staves at the days, and demanded security and payment according to the agreement, and the plaintiff to have refused them because no lease had been executed or a term created, and the defendant suing for breach of contract on that ground, and admitting that no demise had been made, either because the plaintiff had not demanded a lease, &c., or because the defendant had refused to execute one, and asking whether in such circumstances the defendant could have maintained the action. The objection on the plaintiff's part would then be, that a demise to him was a condition precedent or concurrent, without which he was not bound to accept or pay for the staves, &c., his contract therefor having been made with a view to his becoming tenant of the cooper's-shop, &c., for a term of years, and without which the materials bargained for would not be of the same value to him, and that to be obliged to take them without a lease would be contrary to the intention of the parties.

Assuming that the plaintiff had in the meantime given security for performance of the agreement on his part, or that

it had been waived or abandoned, or only demanded concurrently by the defendant, I should think the defendant might maintain such action unless the plaintiff had previously demanded and tendered a lease for execution. If he had done so, and the defendant had refused to execute it, the plaintiff might perhaps say the lease was the primary object of the agreement, and that the defendant having failed in the substantial part, the plaintiff was not bound to perform subordinate parts. Reversing the parties (which is the present case), the same reasoning may not apply in the absence of any step towards performance on the defendant's part. If it did equally well apply, still I should have to say that the agreement seems to me to have made the delivery of the staves, &c. in October and November, separate from the lease. That part of the agreement was not, like the residue, to be incorporated in the lease. If it was, it would have been rendered dependent upon such a lease; but the isolated way in which it is introduced seems to detach it therefrom and render it a substantive, independent clause in the agreement on both sides, and not going to the whole consideration on either; and therefore that the plaintiff having given, or being ready and willing to give, security for due performance on his part, became entitled to demand delivery of the staves on the defendant's part. Everything was to be incorporated in the lease except the furnishing securities on the plaintiff's part, which went to the whole consideration on the defendant's part (and to furnish which readiness is averred), and the delivery of the staves, &c., in October and November, 1852, on the defendant's part, but which went to a part only of the consideration on both sides; under which circumstances the cases appear to establish that it formed an independent clause in the agreement.

I have felt much difficulty in the case; but the best opinion I can form is, that judgment should be for the plaintiff as to the first count and on the demurrer to all the pleas to both counts, and for the defendant on the second count.

MCLAN, J.—The first part of the agreement declared upon relates to the leasing of certain premises of the defendant to

able time after the agreement and at the days. The defendant does not deny such readiness within a reasonable time, unless argumentatively, and if ready at the day it would be sufficient.

The plea alleges—first, that no lease was tendered for execution; second, that no lease was made by the defendant, nor the premises demised to or vested in the defendant (meaning plaintiff), &c.; third, that the plaintiff did not at any time before the time appointed, &c., furnish, &c. Consistently with all this, the plaintiff may have been ready to furnish the security and accept delivery, and the defendant may have refused to execute a lease or to deliver the staves, &c. He does not allege his readiness or willingness to do either.

I have said I did not consider the written request or tender of, or the making of a lease, a condition precedent or concurrent; and if not, the plea is bad; and if the clause respecting security is not void or abandoned, I do not consider it more than a concurrent act, and that readiness and willingness is sufficient to have been averred by the plaintiff.

I have tried to test the first count, and the pleas thereto, by supposing the defendant to have tendered the staves at the days, and demanded security and payment according to the agreement, and the plaintiff to have refused them because no lease had been executed or a term created, and the defendant suing for breach of contract on that ground, and admitting that no demise had been made, either because the plaintiff had not demanded a lease, &c., or because the defendant had refused to execute one, and asking whether in such circumstances the defendant could have maintained the action. The objection on the plaintiff's part would then be, that a demise to him was a condition precedent or concurrent, without which he was not bound to accept or pay for the staves, &c., his contract therefor having been made with a view to his becoming tenant of the cooper's-shop, &c., for a term of years, and without which the materials bargained for would not be of the same value to him, and that to be obliged to take them without a lease would be contrary to the intention of the parties.

Assuming that the plaintiff had in the meantime given security for performance of the agreement on his part, or that

it had been waived or abandoned, or only demanded concurrently by the defendant, I should think the defendant might maintain such action unless the plaintiff had previously demanded and tendered a lease for execution. If he had done so, and the defendant had refused to execute it, the plaintiff might perhaps say the lease was the primary object of the agreement, and that the defendant having failed in the substantial part, the plaintiff was not bound to perform subordinate parts. Reversing the parties (which is the present case), the same reasoning may not apply in the absence of any step towards performance on the defendant's part. If it did equally well apply, still I should have to say that the agreement seems to me to have made the delivery of the staves, &c. in October and November, separate from the lease. That part of the agreement was not, like the residue, to be incorporated in the lease. If it was, it would have been rendered dependent upon such a lease; but the isolated way in which it is introduced seems to detach it therefrom and render it a substantive, independent clause in the agreement on both sides, and not going to the whole consideration on either; and therefore that the plaintiff having given, or being ready and willing to give, security for due performance on his part, became entitled to demand delivery of the staves on the defendant's part. Everything was to be incorporated in the lease except the furnishing securities on the plaintiff's part, which went to the whole consideration on the defendant's part (and to furnish which readiness is averred), and the delivery of the staves, &c., in October and November, 1852, on the defendant's part, but which went to a part only of the consideration on both sides; under which circumstances the cases appear to establish that it formed an independent clause in the agreement.

I have felt much difficulty in the case; but the best opinion I can form is, that judgment should be for the plaintiff as to the first count and on the demurrer to all the pleas to both counts, and for the defendant on the second count.

MCLLEAN, J.—The first part of the agreement declared upon relates to the leasing of certain premises of the defendant to

the plaintiff, and the terms and conditions of the lease. The defendant bound himself to grant and execute a lease on or before the 1st day of October, 1852, to be prepared or approved by the counsel of plaintiff, *upon request made to him in writing under the hand of plaintiff for that purpose*, and the lease was to contain certain stipulations as to rent, &c., to be kept by the plaintiff; but there is no obligation in the agreement resting on the plaintiff to make a request in writing, or to accept a lease if made to him without such request. But even if there were, that portion of the agreement is wholly distinct from and resting on a distinct consideration from the subsequent part, which relates to the delivery of certain machine staves, heading, and hoops by the defendant to the plaintiff. It may have been in the contemplation of the parties that the renting of the cooper's-shop and premises should precede the delivery of the staves and other materials to be used therein; but the taking of a lease by the plaintiff is a matter which, from the terms of the agreement, appears to have been optional with him. By making a request in writing, and furnishing the securities specified, the plaintiff could compel the defendant to execute a lease; but there is no stipulation or covenant on the part of plaintiff to make such request, or to take a lease if executed. There is, however, in the agreement a covenant to deliver to the plaintiff, at the premises specified, the quantities of staves, heading, and hoops, for the non-delivery of which the action is brought; and the promise and undertaking to deliver are not contingent or dependent upon the taking of the lease. No stipulation was to be contained in the lease as to the delivery of the staves, &c., in question; but it was to contain a covenant on the part of defendant to deliver to the plaintiff, not at the premises intended to be leased, but at defendant's factory in Oshawa, certain other staves, at different periods during the years 1853 and 1854. The plaintiff, having no lease and no covenant, cannot enforce the delivery of the last mentioned staves, and perhaps in equity he ought not to claim damages for the non-delivery of the staves, &c., to be delivered in October and November *at the premises* agreed to be leased to him on his request; but the taking of the lease being optional

on his part, and not a condition precedent to the delivery of the staves stipulated for in the agreement, we cannot hold that his action is not sustainable on the grounds urged by the defendants. Another ground of objection is, that the declaration affects to treat the delivery of the staves as wholly independent of the giving of any lease, or the giving of any security. The plaintiff bound himself to furnish particular individuals on or before the *twentieth* day of July, 1852, as securities to the plaintiff for the *due performance of the agreement*; and it was no doubt intended that the security should be for all that the plaintiff would be bound to do under the agreement, including all the stipulations as to payment of rent and keeping the premises in repair, as well as the payment for the staves to be delivered, under the covenant to be inserted in the lease, during the years 1853 and 1854. The security was to have been given on or before the 20th day of July, 1852; and had the agreement been executed in due time, the giving of the security within the time mentioned would undoubtedly be a condition precedent. But it is alleged in the declaration, and not denied on the pleadings, that the agreement was not executed till after the 20th day of July, 1852; and if so, then it was impossible for defendant to fulfil that part of the agreement which related to the giving security by that particular day. The defendant must have been aware at the time of the execution of the agreement that the giving security had become impossible; and it appears to me that under such circumstances his acceptance of the agreement amounted to a waiver of the stipulation to give such security. In the case of *Hall v. Cazenove* (4 East, 477), Lord *Ellenborough*, in delivering judgment, says, "When the deed was executed or concluded by the delivery, the stipulation, which was not impossible in its nature when the deed was first framed, had become impossible from the time having passed; the stipulation had therefore then become wholly nugatory, and cannot be understood as having formed any part of the contract between the parties without imputing to them the most manifest absurdity. Then the rest of the contract may take effect which was prospective at the time when the deed was concluded." Then if that be correct—and it

appears to me to be so—all the stipulations contained in the agreement, except that relating to the giving of security, remained in full force, and the plaintiff had a right to sustain an action for the breach of any part which the defendant was bound to perform.

The pleas of the defendant, setting up as a defence the taking of a lease and the giving of security by the plaintiff as conditions precedent, when in fact the latter had become impossible when the agreement was executed, and the former was wholly optional with the plaintiff, appear to me to be incapable of being sustained. Had it been incumbent on plaintiff to furnish the security mentioned in the agreement within a reasonable time after the agreement was executed, the plaintiff alleges that he was ready and willing to furnish it; and that allegation is not denied by the defendant, nor is there any objection to the declaration on the ground that there is no averment of notice to the defendant of such readiness and willingness, or that such security was offered. But if it were otherwise, I do not know that it could make any difference, if it is to be considered that the plaintiff was released from any necessity to give the security by the defendant's execution of the agreement after the time had elapsed for the giving of such security. It appears to me that all that is now vital in the agreement is that part which relates to the staves, &c., specified in it to be delivered in October and November 1852; that the covenant to deliver these is an independent covenant; and that the first count of the declaration is good. The second count, stating an agreement different from that set out on oyer, appears to be bad, and I think the pleas also bad in law. Judgment, therefore, must be for plaintiff on demurrer to the pleas, and for defendant on general demurrer to the second count.

RICHARDS, J., concurred.

ROSS ET AL. V. FAREWELL ET AL.

Bail—Liability of.

Defendants being bail of H. to the limits of the gaol of the (then) United Counties of York, Ontario and Peel; the County of Ontario, in which the debtor H. resided, being separated by proclamation from the other two counties after the recognizance was entered into, and he having continued to reside in the County of Ontario after its separation from the other two: in an action of debt on the recognizance,

Held, that defendants were liable as for a breach of the recognizance; that the limits of the gaol of the United Counties of York, Ontario and Peel mean the limits for the time being, and that when Ontario was separated they became the limits of the gaol of the two remaining counties.

Writ issued 10th of May, 1854. *Venue*—United Counties of York and Peel. Debt, on recognizance of bail to the limits.

Declaration states that on the 28th of November, 1853, the plaintiffs, in the Court of Common Pleas, recovered against Prosper Armstrong Hurd £1081 3s., in an action of assumpsit, for damages and costs, upon which a writ of *Capias ad satisfaciendum* issued on the same day to the sheriff of the United Counties of York, Ontario and Peel, endorsed for £1062 19s. 8d. damages, and £18 3s. 4d. costs, with interest, &c., which *Ca. Sa.* was delivered to W. B. Jarvis, then being sheriff of the said united counties, and now of the Counties of York and Peel, who arrested the said Prosper Armstrong Hurd thereunder; and thereafter, to wit, on the 2nd of December, 1853, at Oshawa, in the County of Ontario, one of the said united counties, the said Prosper A. Hurd came by his attorney, and defendants in person, before Gavin Burns, a commissioner duly authorized, &c., and thereupon said Prosper A. Hurd was delivered to the defendants, and the defendants then and there became pledge and bail for him, and did jointly and severally undertake that he, said Prosper A. Hurd, should remain and abide at the suit of plaintiffs, within the limits of the gaol for the United Counties of York, Ontario and Peel, and not depart therefrom unless released therefrom by due course of law; and that the said Prosper A. Hurd should and would well and truly obey all notices, orders and rules of court touching and concerning him the said Prosper A. Hurd, remaining or continuing upon the said limits, or being remanded or ordered to close custody therefrom; and in the event of his failing in any particular, that they would repay such sum of money, costs, sheriff's charges, fees and poundage, as the said Prosper A. Hurd was

liable to pay upon and by virtue of the said writ; that the defendants thereupon justified by affidavits, &c., and afterwards, to wit, on the 3rd of December, 1853, the said recognizance was duly allowed by *Draper, J.*, in Chambers, and was on the same day filed in the office of the Clerk of the Crown at Toronto, and notice thereof given to the plaintiffs, and the said recognizance was enrolled of record, as by the record appears, &c., and said Prosper A. Hurd was duly admitted to the limits of the said gaol, in pursuance of said recognizance and of the statute; yet that afterwards he did not remain and abide at the suit of the plaintiffs within the limits of the said gaol, but departed therefrom without having been released therefrom by due course of law, and the defendants did not pay, &c.; whereby, &c. yet, &c.

Pleas.—First, That no *Ca. Sa.* issued against said Prosper A. Hurd, &c.; concluding to the country. Second, That the said Prosper A. Hurd did remain and abide at the suit of the plaintiffs within the said limits, and did not depart therefrom; to the country. Third plea states that at the time said Prosper A. Hurd was arrested and admitted to the said limits he resided in the said County of Ontario, within the said limits, and continued to reside there until the said County of Ontario was set apart as a separate county by proclamation, on the 1st January, 1854, issued at Quebec, under and by virtue of which proclamation the said County of Ontario, in the which said Prosper A. Hurd then resided, ceased to form part of the said limits and became a county of itself, and that said Prosper A. Hurd hath ever since continued to abide within the limits of the said County of Ontario, and hath never departed therefrom, nor was at any time required by plaintiffs to abide within the limits of the said Counties of York and Peel; and that, save as aforesaid, the said Prosper A. Hurd never did depart from the said limits of the said United Counties of York, Ontario and Peel, and that he was by means of premises released from the said limits of the said gaol of the United Counties of York, Ontario and Peel by due course of law, in manner aforesaid: concluding with a verification.

Replication.—To first and second pleas, *similiter*. To

third plea, that said Prosper A. Hurd hath not continued to abide within the limits of the said County of Ontario, as in said third plea alleged, but hath departed therefrom; to the country, *and similiter*.

At the trial, before *Burns, J.*, at the last fall assizes for the United Counties of York and Peel, the plaintiffs produced an exemplification of the *Ca. Sa.*, also the Provincial "Gazette" of the 31st December, 1853, containing the proclamation of that date, setting off the County of Ontario, and it was admitted that the county was thereby separated on the 31st of December, 1853. The debtor, Prosper A. Hurd, was called by plaintiffs, and said he had been arrested at plaintiffs' suit, and gave bail to the limits; that he resided at Prince Albert, in the County of Ontario; that before the 10th of May, 1854, he had frequently been in Toronto from his said place of residence, and after the 1st of January, 1854, but that he had not been out of the Counties of York and Ontario since bailed to the limits.

A verdict was then rendered for the plaintiffs for £1146 15s. 11d., subject to the opinion of the court.

In the following term (M. T., 18 Vic.) *McDonald*, for plaintiffs, obtained a rule on defendants to shew cause why the verdict should not be entered for the plaintiffs on all or some of the issues, or why the *postea* should not be delivered to them, or why the judgment should not be entered for the plaintiffs for £1146 15s. 11d. on the facts appearing in evidence, &c., pursuant to leave reserved.

Dr. Connor, Q. C., and *Vankoughnet, Q. C.*, shewed cause; they referred to the P. S. 10 & 11 Vic. ch. 15, sec. 5; 3 Vic. ch. 5; 11 Geo. IV. ch. 8; 12 Vic. ch. 78, secs. 3 & 32; 4 Wm. IV. ch. 10, secs. 2 & 3; 14 & 15 Vic. ch. 5, secs. 16 & 12; and contended that the last issue was an immaterial one, and should be found for the plaintiffs—that it turned upon the second; the question being whether the limits of the jail being curtailed by the proclamation of 31st December the debtor Hurd was bound to take notice thereof and to conform thereto by residing within such curtailed limits—that is, within the United Counties of York and Peel, and contended,

First, That the liability of a surety could not be extended.

able time after the agreement and at the days. The defendant does not deny such readiness within a reasonable time, unless argumentatively, and if ready at the day it would be sufficient.

The plea alleges—first, that no lease was tendered for execution; second, that no lease was made by the defendant, nor the premises demised to or vested in the defendant (meaning plaintiff), &c.; third, that the plaintiff did not at any time before the time appointed, &c., furnish, &c. Consistently with all this, the plaintiff may have been ready to furnish the security and accept delivery, and the defendant may have refused to execute a lease or to deliver the staves, &c. He does not allege his readiness or willingness to do either.

I have said I did not consider the written request or tender of, or the making of a lease, a condition precedent or concurrent; and if not, the plea is bad; and if the clause respecting security is not void or abandoned, I do not consider it more than a concurrent act, and that readiness and willingness is sufficient to have been averred by the plaintiff.

I have tried to test the first count, and the pleas thereto, by supposing the defendant to have tendered the staves at the days, and demanded security and payment according to the agreement, and the plaintiff to have refused them because no lease had been executed or a term created, and the defendant suing for breach of contract on that ground, and admitting that no demise had been made, either because the plaintiff had not demanded a lease, &c., or because the defendant had refused to execute one, and asking whether in such circumstances the defendant could have maintained the action. The objection on the plaintiff's part would then be, that a demise to him was a condition precedent or concurrent, without which he was not bound to accept or pay for the staves, &c., his contract therefor having been made with a view to his becoming tenant of the cooper's-shop, &c., for a term of years, and without which the materials bargained for would not be of the same value to him, and that to be obliged to take them without a lease would be contrary to the intention of the parties.

Assuming that the plaintiff had in the meantime given security for performance of the agreement on his part, or that

been before that day.—23 Eng. R. 365. That defendants knew that united counties might be separated and the limits curtailed when they became bound; that it is the same gaol with moveable limits, and they must be held bound to have contracted with a view to the contingency that happened, and should have seen that the debtor conformed to the change in the limits; that the contract is not varied, extended, or abridged, and that the operations of the act of Parliament can make no difference as to the defendants' obligations.—*Macdonald v. Weeks*, 3 U. C. Q. B. R. 441. That no impossibility was created; that the debtor might have withdrawn into the new limits, in prospect of the separation of Ontario, or ought to have done so promptly upon the knowledge of such separation being published, instead of which he went backwards and forwards to and from Toronto afterwards. That the breach is worded in general terms; that the debtor left the limits of the said gaol; that the consideration was the true meaning and effect of defendants' contract.—*Barker v. Hogson*, 3 M. & S. 267; *Wilkins v. Tims*, U. C. Chan. Rep. Com. Dig. Con. D. 17; Co. Lit. 206 (a).

MACAULAY, C. J.—The possible hardship of this case upon the defendants induced me at first to suppose that on some legal and sufficient ground or other they must be found not liable. But upon consideration, I am unable to point out what I consider such sufficient ground. The 4 Wm. IV. ch. 10, sec. 3, expressly enacted that the extension of gaol limits thereby established or authorized to be established should not affect or make void any securities already given for the enjoyment of the then existing limits, but should continue in fact, and extend the said newly assigned limits; and I do not see that the same effect ought not to have been given to them by judicial construction had no such enactment been made. The 10 & 11 Vic. ch. 15, restrains the privilege, unless a new security be given under that act.

It is clear, the legislature in extending the limits, did not intend to discharge all existing bail and to compel the sheriff either to commit the parties so bailed to close custody, or take the risk of their escaping from the new limits while he permitted them to enjoy the same.

The first act 11 Geo. IV., ch. 3, authorises the sheriff to grant the limits without being liable as for an escape, and to take bail; therefore the limits so authorized are the limits of his gaol, which limits are co-extensive with his district, county or united counties. The stat. 12 Vic. ch. 78, provided for the separation of united counties before this bail was entered into, the defendants therefore knew the limits were liable to be curtailed as the law then stood, though they could not be extended. Their undertaking was that the debtor should remain and abide within the limits of the gaol, &c., and not depart therefrom. Now, after the county of Ontario was detached, which was no act of the plaintiffs, the debtor, in fact, not only did not remain and abide within the limits of the gaol, but did depart therefrom. To ascertain the limits we must first ascertain the gaol of which they are the limits: that gaol is situate in the county of York, the senior of the united counties—it is then the limits thereof that are intended. It is contended the recognizance means the limits at the time it was acknowledged and not for the time being; if it had said the debtor should remain and abide within the limits of the (then) three united counties, it would have been another thing; then the limits of the three united counties, and not the limits of the gaol would have been the test; but it is not so: and I think, limits of the gaol, mean of the particular gaol in the city of Toronto, &c., for the time being, seeing that they were liable to vary. It was not impossible for the bail to have watched a proclamation and provided against the change by surrendering their debtor, or by seeing that he kept within the limits when curtailed; the debtor was in their custody and power; the sheriff cannot be made liable as for an escape, as he might be perhaps if the defendants were discharged and exonerated by reason of the change.

Whether the defendants could have rendered the debtor within eight days after service of process, or within a reasonable time after the county of Ontario was detached are not questions now before us; they certainly might have done so before the proclamation issued, though it did not afford time to have done so between its issue and the time appointed for the separation, and I cannot see my way in holding that because the debtor was at first entitled to the county of

Ontario as being within the limits of the gaol, that therefore he is entitled to be there or to go there at his discretion after it was separated and ceased to be any part of the limits of the gaol in question. The effect of gaol limits is as it were to extend the walls of the prison, and in that point of view he was bound to abide within the same as they might be for the time being.

Instead of a whole county, a single township or part of one might be detached, as the statutes shew, and joined to other counties; the limits of the gaol of which they formerly formed part would be so far abridged and the township so detached, would become part of the limits of the gaol of the county or united counties to which it was transferred.

McLEAN, J. and RICHARDS, J. concurred.

Rule absolute.

CROFT V. THE TOWN COUNCIL OF PETERBOROUGH.

Municipal corporation.

The defendants, a municipal corporation, having passed a resolution to authorize the raising and levelling of a street within their jurisdiction, which was accordingly done, and plaintiff's premises overflowed thereby, The plaintiff having been nonsuited on the ground that the defendants were authorized by statute to do what they had done, the Court set aside the nonsuit and granted a new trial, in order to ascertain whether in fact the work done constituted a repair of the street within the statute, or exceeded such a repair, to the injury of the plaintiff's house and land.

McLEAN, J., *dissentiente*.

This is an action on the case against the defendants for wrongfully raising the street and side-walk, on which plaintiff's dwelling-house and shop abutted, several feet higher than it was before; by means whereof his said house was overflowed with water, to the damage of his business, health, &c.

Pleas.—First, Not guilty by statute. Second, Not guilty of raising the street, &c., by statute. Third, Not guilty of raising the side-walk, by statute. Fourth, Plaintiff not possessed. Fifth, As to raising the street, a special justification that defendants were a municipal corporation and authorized so to do, the street being within their jurisdiction, and being below the proper level opposite plaintiff's house, whereupon it became defendants' duty to raise it, and they did so. The plea alleges that the defendants caused it to be done, not saying that a by-law was passed for the purpose.

Replications.—*Similiter* to first, second, third, and fourth pleas. To sixth plea—*De injuriâ*; that defendants, of their own wrong, and without the cause alleged, committed the grievances, &c.

It was urged at the trial, before *McLean, J.*, at the last Peterborough assizes, that the defendants had caused the street to be raised, being within their jurisdiction, but that the work was only authorized by a resolution of the municipal council of the town, and not by a by-law under the seal of the corporation; wherefore the act was illegal, and defendants liable as wrong-doers through their agents and workmen.

The learned judge nonsuited the plaintiff, with leave to move, &c.

In the following term (Trinity Term, 1854), *Weller*, for plaintiff, obtained a rule on the defendants to shew cause why such nonsuit should not be set aside,—referring to Pro. Stat. 12 Vic. ch. 81, sec. 31, No. 10, and secs. 60, 190, 192, 195; *Brown v. The Municipal Council of Sarnia*, 11 U. C. Q. B. R. 87; S. C., *ib.* 215; *Sutton v. Clarke*, 6 Taunt. 29.

Crooks, A., shewed cause during the same term, and referred to the peculiar terms of the declaration, and contended the defendants had no authority in the premises without acting through the medium of a by-law—12 Vic. ch. 81, sec. 192; *Kerby v. The Grand River Navigation Co.* 11 U. C. Q. B. R. 331; *Young v. The Grand River Navigation Co.* 12 U. C. Q. B. R. 75; 16 Ju. 6; *Grant on Cor.* sec. 78. Moreover, that defendants could not be made liable without a by-law; and if no by-law, that the remedy should be against the persons who did that which caused injury to plaintiff's close—14 & 15 Vic. ch. 109; 16 Vic. ch. 181, sec. 33. That being treated as wrong-doers in this action, the defendants might justify the act as clearly within their legislative jurisdiction by means of a by-law, and consequently within their executive powers when prosecuted for an act they were clearly empowered to direct.

Weller, in reply, contended—First, That the defendants were liable, because they directed the road to be raised without doing so through the medium of a by-law, against which, if passed, plaintiff might have remonstrated, or appealed, or

become entitled to compensation. Second, Not only did defendants act without any by-law, but employed servants or agents, who did the work negligently, to plaintiff's damage, as he was prepared to have proved had he not been nonsuited. That the powers entrusted to defendants should be strictly pursued, and power to pass by-laws for certain specified purposes did not authorize such purposes to be accomplished without by-laws—22 Eng. Rep. 198. That defendants had no independent or incidental power to raise the street; only power to pass by-laws for that, among other enumerated purposes—*Brown v. The Municipal Council of Sarnia*, 11 U. C. Q. B. R. 215; and that the street could not, by defendants or their servants, be raised as it was to plaintiff's serious damage, without a by-law at least to sanction it—*Sutton v. Clarke*, 6 Taunt. 29; *Leader v. Moxton*, 3 Wil. 461; *The Governor, &c., of the Cast-plate Manufacturers v. Meredith*, 4 T. R. 794; *Allen v. Hayward*, 7 Q. B. 960; *Pro. Stat. 12 Vic. ch. 81, sec. 195*. He also submitted that what had been done was equivalent to a change of the old road, under the statute entitling plaintiff to compensation, which he could not enforce or obtain in the absence of a by-law.

MACAULAY, C. J.—By the statute 12 Vic. ch. 81, sec. 190, all powers, duties, or liabilities vested in or belonging to the magistrates in quarter sessions, with respect to any particular road, &c., at the time that act came into force, were vested in the municipal corporation of the county, &c., subject always to the provisions of that act as to the mode and manner of exercising, performing, and meeting such powers, duties, and liabilities, and all rules and regulations made and directions given by such municipal corporation in the premises, shall have the like force and effect, &c., as those which the magistrates had previously the power of making, &c.

By section 61 certain towns, including Peterborough, were incorporated with the same corporate powers as the inhabitants of villages incorporated, to be exercised by, through, and in the name of the town council of such town, &c. Section 67 says the same powers, duties, and liabilities. Section

71, No. 5, authorizes by-laws to assess proprietors of real property in the town to defray the expense of making or repairing any flagging, posts, or pavements in any public street opposite or near such property, &c. ; No. 7, for borrowing money necessary for the execution of any town work ; No. 9, or generally. Section 60, No. 1, enacted that the municipality of each village should, moreover, have power and authority to make by-laws for the opening, constructing, making, levelling, raising, lowering, repairing, improving any new or existing highway, road, street, side-walk, &c., within the jurisdiction of the village corporation, and for the stopping up, putting down, widening, altering, changing or diverting any such highway, road, street, &c., subject to the provisions added thereto ; then follow various other specific objects from No. 2 to No. 24. Sections 191, 192, and 195 contain further provisions on the subject. Section 177 provides for levying necessary funds for municipal purposes.

Previous acts relating to this subject are—4 Geo. IV. ch. 9, secs. 6 & 9 ; 1 Vic. ch. 21, sec. 20 ; 4 & 5 Vic. ch. 10, secs. 45 & 51. Subsequent acts are—14 & 15 Vic. ch. 109 ; and 18 & 14 Vic. ch. 15.

The objection is, that the defendants have wrongfully raised the street and side-walk in front of the plaintiff's house and premises, to his prejudice and injury, without a by-law authorizing or directing it. But the pleadings do not put in issue whether the defendants caused it to be done by a by-law or not. The declaration charges the defendants with having wrongfully raised the street or side-walk on which his house and shop abutted several feet higher than it was before, by means whereof his house, &c., were overflowed with water, to the damage of his business, health, &c.

The pleas deny the wrongful act alleged—that is, the raising of the street, to the plaintiff's injury, &c.—*Bell v. Howard* (7 C. B. 201), *Torrence v. Gibbins* (5 Q. B. 297). They also deny so raising either the street or side-walk in fact ; and the sixth plea alleges the street was within their jurisdiction, and below the proper level opposite the plaintiff's house ; wherefore it became their duty to raise it, and they

did so. The replication to the fifth plea is, that the defendants, of their own wrong, and without the cause alleged, committed the grievances on which issue is taken.

The cause or matter of excuse alleged—*Barnes v. Hunt* (11 East 455)—is, that the street being within their jurisdiction and below the proper level, and it being their duty to raise it, they did raise it—*Rex v. Holland* (5 T. R. 619), *Farr v. Hollis* (9 B. & C. 331), *Cane v. Chapman* (5 A. & E. 647), *Seymour v. Maddox* (16 Q. B. 328).

The material points are therefore—First, whether the street was within the defendants' jurisdiction; and if so, second, whether it was below the proper level; if so then, third, was it as a consequence their duty to raise it?

They do not plead that, being empowered to make by-laws for making streets, &c., they made such a by-law on the occasion in question; but being charged as wrong-doers, they justify the act without relying upon any by-law. If the defendants cannot in cases of this kind plead the general issue per statute, and give the special matter in evidence under it—and it has not yet been decided that they can—the plaintiff would have been entitled to a verdict on the first issue, upon proving the wrongful acts alleged; he would be entitled to a verdict on the second and third issues on proving that the defendants did raise the street and side-walk as alleged, facts admitted at the trial; and a verdict on the fourth issue if possessed, &c., which fact was also admitted. The plaintiff was therefore nonsuited, because it was assumed that, however injurious to the plaintiff in the manner and form alleged, the defendants were justified in doing what had been done without any previous by-law to authorize it. Unless open to investigation under the general issue, I cannot say I think that fact in issue. The defence rested under the last plea, which does not allege or rely upon a by-law.

It appears to me the nonsuit should be set aside, because the plaintiff would be entitled to a verdict on the four first issues, if he proved his case *prima facie*; and that the burthen of proof was on the defendants, as to the facts in issue under the fifth plea, which do not seem to have been admitted or proved.

As to the question that has been argued, it may be material

to consider it with a view to another trial or amended pleadings.

In addition to the powers conferred upon the defendants by the 12 Vic. ch. 81; the 13 & 14 Vic. ch. 15 enacted that the right to use as public highways all roads, streets, and public highways within the limits of any incorporated town, &c. (subject to the exception therein made) should be vested in the municipal corporation of such town; and such roads, streets, and highways should be maintained and kept in proper repair so long as they should remain open as such, by and at the cost of such corporation; and if such corporation should fail to keep the same in repair, such default should be a misdemeanor, punishable by fine, &c.; and such corporation should be also civilly responsible for all damages sustained by any person by reason of such default, &c. Being thus the duty of the defendants to maintain and repair the public streets placed under their charge—and it is not suggested that the street in question is not one of them—they may perform such duties without a by-law to authorize, it being a duty obligatory upon them by the statute, at the peril of an indictment or a civil action for the culpable neglect of such duty. That by-laws are in many instances essentially necessary to justify or to render imperative that which was not so before, or to provide for raising the necessary funds, or to specify and define what was to be done, or for some purposes beyond the mere maintenance and repair of the streets, &c., and that by-laws are prudent even when not absolutely necessary, I think there can be no doubt.

It is not contended that the defendants might not have authorized the raising of this street to the extent that has been done through the medium of a by-law. It is contended, however, that, having done, or caused to be done, without a by-law, that which has operated as a nuisance to the plaintiff's premises, the defendants are responsible for the act and its consequences; and that if the work was not legally authorized upon common law principles, or by the statutes, irrespective of any by-law, or of the clauses empowering and authorizing them to make by-laws, they cannot justify that which caused the injuries to the plaintiff, and of which he complains, in the absence of a by-law.

The defendants contend that the action is not for doing what was done without a by-law, but for doing it at all, which is charged to have been wrongfully; and that if chargeable as wrong-doers, though not directed by them through a by-law or under seal, they may (confessing the act) justify it as being within the scope of their corporate powers and jurisdiction, without proving that such powers were exercised under seal or through a by-law—12 Vic. ch. 81, sec. 198; *Arnold v. The Mayor, &c., of Poole* (4 M. & G. 861). That they may shew it was their incumbent duty to do it; or if not, and only within their discretion in order to improve the street, that they may shew nothing more done than a by-law might have directed and authorized; and that therefore they are not amenable as tort-feazers. That they cannot be made liable to an action of this kind not for exceeding their powers, but merely for informally exercising their authority in the premises.

The general rule is stated to be, that corporations act and speak only through their seal—*Ba. Ab. Corporations E*; *Mayor of Thetford's Case* (1 Salk. 192, S. C. 3 Salk. 103), *Dunston v. Imperial Gas Co.* (3 B. & Ad. 125), *Reid v. Leslie* (12 Q. B. 998), *Jackson v. Taylor* (5 Ex. R. 442), *McLean v. Waters* (8 C. B. 669), *Arnold v. The Mayor, &c., of Poole* (4 M. & G. 860-1)—which explains perhaps why by-laws are in relation to the subject matter mentioned in the 12 Vic. ch. 81, sec. 66, No. 1, and required to be sealed by sec. 198. But it is now well settled that corporations may be indicted or subjected to civil actions of trespass, or on the case for torts of various kinds arising from misfeasance or nonfeasance—*Horn v. Ivy* (1 Vent, 47), *Yarborough v. The Governor, &c., of the Bank of England* (16 East, 6), *Smith v. The Birmingham, &c., Gas Light Co.* (1 A. & E. 526), *Maund v. The Monmouthshire Canal Co.* (4 M. & G. 452), *Regina v. The Birmingham and Gloucester Railway Co.* (3 Q. B. 223), *Regina v. Scott* (8 Q. B. 543), *Regina v. The Great North of England Railway Co.* (9 Q. B. 315), *Regina v. The Town Council of Lichfield* (10 Q. B. 534-747), *Farrell v. The Town Council of London* (12 U. C. Q. B. R. 343);—and I doubt

not corporations may become liable as tort-feazors for things done by their directions without by-laws, for which they would not have been so liable had such things been previously authorized thereby; and that they might incur such liability even for acts done in pursuance of a by-law where their powers and jurisdiction were therein exceeded, and injury and damage inflicted under it (a). At the same time I also think that cases may exist in which, although a by-law would have been judicious and prudent, and the more regular course, the act may be justified without it. But, while I feel the force of the argument, that authority to make by-laws for specified purposes impliedly confers authority to do what by-laws may be passed to accomplish, still I do not think that the mere power to make by-laws does necessarily confer by implication equal powers to act without them, as many of the provisions contained in the 12 Vic. ch. 81, sec. 60, sub-secs. No. 1 to 19 illustrate. It must therefore depend upon circumstances.

My present impression is, that if the facts in this case shew that it became the defendant's duty, under the 18 & 14 Vic. ch. 15, to raise the street, they would be justified; but that in the absence of a by-law they must rely upon the powers possessed by them expressly or incidentally, irrespective of the 12 Vic. ch. 81, sec. 60, No. 1; and that for any excess or negligence in the execution of the work producing consequential injury and damage to the plaintiff, they would be liable; although if a by-law had been made, legal in its provisions, they would not be liable for excesses or neglect in its execution, or for consequences prejudicial to the plaintiff, for which they would not have been liable if expressly authorized by the statute without any special by-law to do what the by-law directed to be done.

In the absence of a by-law directing and defining the work, I consider the defendants responsible, in the first place, to the same extent as commissioners of highways acting under and executing duties and powers assigned to them by statute, according to the decisions in England; and, in the second

(a) See 12 Vic. ch. 81, sec. 155; 14 Vic. ch. 109, sec. 35, sched. A, No. 21; 22 L. J. C. P. 81; 16 Eng. Rep. 442; 11 C. B. 867; 18 Jur. 146; 22 Eng. Rep. 198.

place, for neglect or misconduct in their workmen, or for mal-construction of the work, causing damage to the plaintiff, for which such commissioners might not be liable. In the event of a by-law being made, I look upon the defendants as liable only so far as the by-law itself may be illegal on the face of it, or in what it directed to be done, but not for excesses, or for misconduct in its execution exceeding its provisions, and not contemplated or required thereby. Their responsibility would be limited to the by-law, and not be extended to its execution under contracts duly made in conformity therewith, however an additional responsibility might arise if the by-law was executed by the immediate officers and servants of the corporation, and the work was negligently and carelessly mismanaged by them in its performance (a). If in executing the works by the defendants through contractors, or by officers and servants of the corporation, excesses were committed, or the jurisdiction and powers exceeded to an extent such as rendered the defendants liable in such cases as *Leader v. Moxon* (3 Will. 461, S. C. 2 W. B. 924), and the remarks of *Gibbs*, C. J., in reference thereto in *Sutton v. Clarke* (6 Taunt. 43, S. C. 1 Mar. 429), *Weld v. Gas Light Co.* (1 Stark, 189), *Roberts v. Reed* (16 East, 216), *Jones v. Bird* (5 B. & A. 837, S. C. 1 D. & R. 497), *Wilks v. The Hungerford Market Co.* (2 Bing. N. S. 281), *Brown v. Municipal Council of Sarnia* (11 U. C. Q. B. R. 87), *Farrell v. The Town Council of London* (12 U. C. Q. B. R. 343), *Brown v. Clegg* (16 Q. B. 682), *Ellis v. The Sheffield Gas Co.* (18 Jur. 146, 22 Eng. Rep. 198), I think the defendants would be liable in like circumstances. My difficulty is, whether the facts may bring the case within such decisions as *The Governor & Co. of the Plate Glass Manufacturers v. Meredith* (4 T. R. 794), *Sutton v. Clarke* (6 Taunt. 29, S. C. 1 Mar. 429), *Boulton v. Crowther* (2 B. & C. 703, S. C. 4 D. & R. 195), *The Grocers' Co. v. Doane* (3 Bing. N. S. 34), *Rex v. The Bristol Dock Co.* (12 East, 428), *Boyfield v. Porter* (13 East, 200), *Kerby v. The Grand River Navigation Co.* (11 U. C. Q. B. R. 334), *Young v. The Grand River Navigation Co.* (12 U. C. Q. B. R. 75), *Matthews v. West London*

(a) See 22 L. J. C. P. N. S. 81; 16 Eng. Rep. 442; 12 U. C. Q. B. R. 343.

Water Works Co. (3 Camp. 403), doubted in *Peters v. Clarson* (16 Jur. 65, S. C. 21 L. J. C. P. 52, 8 Jur. 648, 7 M. & G. 548, 8 Eng. Rep. 479), in which, although the plaintiffs were injuriously affected and damnified by the works, there was no excess of authority, nor any culpable neglect in the execution thereof, nor any wilful, unnecessary, malicious, or oppressive abuse of the powers intrusted to those sought to be charged and made responsible in civil actions.

In the case lastly referred to, the defendants were by law authorized to do what they did in the *bonâ fide* execution of public duties, and therefore not responsible for unforeseen consequences injurious to private individuals. Upon the same principle it would seem to follow in the present case that so long as what the defendants did by their agents or servants was within the scope of their powers and duties under the statute or common law, without any special by-law on the subject, I think they would be in the like circumstances as the public functionaries in England, empowered to perform similar duties, and who were held exempt from actions of this kind.

The more immediate question at present is, whether the defendants incur liability when they exceed the powers so conferred or incidentally derived from those sources, but do not exceed what it is within their legislative jurisdiction to have authorized by a by-law; in short, whether it was within their authority to do what this declaration charges without a by-law to sanction it,—the declaration charging them with having wrongfully raised the street and side-walk, to the plaintiff's injury, not alleging negligence wilful or inadvertent, but complaining of the works *in toto* as wrongful, &c. Reduced to that point, I should think the declaration displayed a sufficient *primâ facie* cause of action; but I am not prepared to say whether, in the absence of a by-law, the facts would sustain the allegation of wrongfulness or not. Much may depend upon the state of the street and the nature of the repairs. It is not suggested that it caused a public nuisance, or that it was not a decided improvement of the street as a highway and beneficial to the public; and if so, it is manifest that the plaintiff has legal difficulties to contend with in

establishing that the work was nevertheless wrongful generally, or wrongful towards him personally as a private nuisance to his property.

In the argument the principal stress was laid upon the want of a by-law as sustaining the charge of wrongfulness, as if that omission necessarily placed the defendants in the position of wrong-doers if the plaintiff proved the work injurious in its consequences to his house or lands. I do not think such an inference follows as of course, but that it must depend upon circumstances; for I am satisfied that, irrespective of any special by-law, the defendants may justify many things in relation to the maintenance and repair of the streets that mere volunteers could not do—*Lord Lonsdale v. Nelson et al.* (3 D. & R. 556).

I think the question must be, not whether it might have been authorized or legalized by a by-law, but whether it is illegal, or can be justified without one; and in considering such a question I do not think the power to sanction and direct improvements of the kind, when they infringe upon private rights through by-laws legally made, confers by implication the power to make them without by-laws—*Hopkins v. The Mayor of Swansea* (4 M. & W. 683), *Gosling v. Veley* (7 Q. B. 451). The plaintiff might remonstrate against a by-law while in course of being passed, or he might appeal against it if illegal in its provisions: at all events, acting without it is not executing the powers imparted by the legislature in conformity with the forms and observances required. If then the acts complained of are justifiable irrespective of the 12 Vic. ch. 81, sec. 60, No. 1, the defence is open to the defendants under the fifth plea; if they are not, I do not think a justification can be sustained under that clause; for it only authorizes the making of by-laws for certain specified purposes, and does not confer the power to do the thing it so authorizes without them.

I am at present disposed to think it within the general and incidental powers of the defendants to maintain and repair and to improve the public streets of the town placed under their charge; and, in doing so, to raise or lower them, as may be found necessary, judicious, or convenient for the

public use, not exceeding what is reasonably requisite and proper, and doing no unnecessary injury to the property of others, but using due care and precaution to avoid injury to the same. But if the work cannot be justified on such grounds, then, in the absence of any by-law, I think the defendants would be responsible to the injured parties.

I am not prepared to lay down any general rule touching the line of separation in matters of this kind, between cases in which a by-law may or may not be necessary. In my present impressions, cases of either kind may arise, according to the circumstances. Whatever is cast upon the defendants as executive duties, under the statutes, in relation to the maintenance or repair of the roads, or whatever is fairly included in those terms, they may do without a by-law: when not so, and it is only within their discretion in the exercise of their legislative powers, it would be otherwise. In the present case it may form a question to be decided by a jury when the facts are ascertained.

It is stated that the defendants directed the work in question by a resolution of the municipal council, but not sealed: if so, it would, I suppose, constitute an informal or imperfect by-law; and there is force in the argument that the statute 12 Vic. ch. 81, sec. 198 requires by-laws to be authenticated by the seal of the corporation, to confirm the act and for the purpose of legal proof, without their being entirely void to all intents and purposes if not so sealed and signed, &c. I suppose, however, that the seal would be deemed essential to the validity of a by-law when the occasion necessarily requires a by-law to be made. The safe and prudent course is for the municipality to act through by-laws whenever practicable, and not to rely upon general or incidental powers under circumstances in which the power to proceed thereby is expressly given, and when the omission to do so may lead to actions of the present kind.

I will merely add that, from what was said and took place at Nisi Prius, I am much disposed to think the acts complained of will be found justifiable without a specific by-law made in due form, but not so clearly as to feel justified in upholding the nonsuit. I should desire to learn the facts before I express a distinct opinion on the subject.

MOLAN, J.—I am still of opinion that the plaintiff cannot maintain this action, and that the nonsuit was right. When it was admitted, as it was upon the trial, that the street had been raised by the defendants in discharge of a public duty—a duty which by law they alone were authorized to perform—then, in my judgment the *mode* by which they had proceeded became wholly immaterial; nothing was done but what the law authorized and duty required the defendants to do, and whether that was done under the sanction of a by-law regulating statute labor, or by contract entered into with an individual sanctioned by a resolution of the council, the act was equally justifiable. The plaintiff appears to rest his right to recover on an alleged fact that though the street was raised under the sanction of the defendants acting in their corporate capacity in behalf of the public, yet as it was not done in pursuance of any by-law that it was therefore illegal. Now I do not admit the correctness of this conclusion, and I am unable to see that the only mode of proceeding to be adopted in such cases must necessarily be by by-law. I can imagine that where statute labor is to be applied to a particular piece of road, or where some provision is necessary to regulate the time and manner of doing statute labor, a by-law may be essential; but I can see nothing to prevent any town council from carrying out any improvement on any highway or street within its jurisdiction by contract with any individual who may agree to make it. It is quite competent for a council to get plans and estimates of any intended improvements including the raising or levelling of particular streets, and, when such are obtainable, to give out contracts for doing the work according to such plans and estimates. A by-law in such a case would be superfluous and unnecessary, and cannot therefore be considered essential in law. It is true that under the 61st section 12 Vic., ch. 81, the inhabitants of the town of Peterborough and the towns similarly situated are severally declared to be a body corporate, with the same corporate powers as the inhabitants of villages incorporated under that act, except in so far as such powers may be by that act increased, lessened, or modified: and when the corporate powers conferred on villages are referred to, we find that they

are authorized to *make by-laws* for the opening, constructing, making, *levelling, pitching, raising*, lowering, repairing, planting, improving, preserving and maintaining *any new or existing highway, street, square, sidewalk* or other communication within the jurisdiction of the corporation. Then, by the 59th section it is declared that the municipality of every village shall have all *such powers*, duties and liabilities within such village, as the municipality of any township shall have in respect of such township. It becomes necessary then to refer back to the 2nd section of the act, in which the corporate powers of townships are defined, and there we find among other things, that the township municipalities have the power of "making and entering into such contracts as may be necessary for the exercise of their corporate functions." Will it be said that a by-law is in all cases necessary before a contract can be entered into? I think it is not so; but that whenever the council decide upon a particular piece of work and the manner in which it is to be done, and the price to be paid for it, they may by a mere resolution direct a contract to be entered into under the seal of the corporation, and such contract will be binding and valid in law, quite as much as if the formality of passing a by-law under the corporate seal had been previously gone through. If then a formal by-law is not in all cases necessary to enable a corporation to proceed with works under their control, I cannot see that the want of such a by-law can make such corporation liable for doing what they may do without it. It certainly does seem to me that it would be rather absurd to hold that an act lawful in itself shall be deemed unlawful because done without all the *formalities* which some might deem necessary but which common sense would pronounce to be superfluous.

The cases which were cited by the counsel for the plaintiff on the argument (21 Eng. Rep. 198, 6 Taun. 29, 7 Q. B. 960, 4 T. R. 794) do not seem to me to help him in any respect; they only shew that where there is a contract to do an *unlawful act* the employer is liable for any injury arising from the act. The act in this case was not unlawful, for it was a duty thrown by law on the defendants, which they were bound to discharge.

The case recently decided in this court as to the right of the Corporation of the city of Toronto to construct a sewer, by which another corporate body, the City Water Works Company was injured, seems to me to be decidedly in point in this case, and in fact to govern the decision; in that case the mode of doing the act was not questioned, but the *right* to do it; and in the case of *Brown v. The Township Municipality of Sarnia*, it was held that the defendants need not shew that they proceeded to do by by-law what the law authorized them to do, and several cases in our own courts establish that where parties have authority by law to do specific acts they cannot be held responsible for any injury arising from the performance of such acts. The plaintiff's declaration alleges the raising of the street to be *wrongful* on the part of the defendants, but being sanctioned by law it must be regarded as *rightful*.

On these grounds, therefore, I am of opinion that the rule *nisi* in this case must be discharged with costs.

RICHARDS, J.—I concur in the judgment of the learned Chief Justice that the nonsuit should be set aside, and a new trial had between the parties.

I am also very much disposed to go the length he does as to the necessity of a by-law to justify the acts referred to by him, even where the legislature has authorized the municipality to make by-laws for these purposes by 12 Vic. ch. 81 and other acts.

As, however, it is not absolutely necessary in this case that any decision on the point should be given, I refrain from expressing a decided opinion. In other respects I concur in the judgment of the Chief Justice.

Per Cur.—Rule absolute.

RIDOUT ET AL. V. KETCHUM.

Sale of land for taxes.

The east and west halves of lot No. 1 in the 2nd concession of the township of Mono, each containing 100 acres, were granted by the crown at different times,—respectively in 1823 and 1829,—and to different persons. The taxes being in arrear, lots Nos. 1 and 2 were returned by the treasurer of the then Home District as in arrear for eight years' taxes, being £6 10s., (the taxes on 400 acres for eight years,) without distinguishing that one portion of these taxes was upon lot No. 2 and another portion upon lot No. 1, or upon the separate halves of No. 1. The lands were advertised by the treasurer as in arrear for taxes under the statute 59 Geo. III. ch. 7, the assessment law then in force, in these words: "Lots 1 and 2 in the 2nd concession, West Hurontario-street, in the township of Mono, £6 10s." In the writ issued to the sheriff for levying the taxes the sheriff was directed to levy in respect of lots 1 and 2 £6 10s., in the same language as that used in the advertisement.

The sheriff, at an adjourned sale under that writ, held on the 5th of January, 1842, put up the whole of lot No. 1 for the sum of £3 12s. 6d., being £3 5s. the eight years arrears of taxes for 200 acres, and 7s. 6d. the expenses of the sale; and for that sum 25 acres, portion of the east half, were sold.

Held, that under the facts the sale was void; for that as a portion of the east half had been sold for taxes, part whereof had accrued upon the west half, and was not chargeable on the east half, and there were no means of apportionment, it was void as to all.

EJECTMENT. Writ issued on the 6th of September for twenty-five acres of lot number one in the second concession west of Hurontario-street, in the township of Mono, being the south-east angle of said lot, seven chains fifty links, by thirty-three chains, thirty-two links.

At the trial it was admitted—First. That the east half of lot number one, in the second concession of Mono, west of Hurontario-street, was granted in fee to Seneca Ketchum on the 4th of July, 1823.

Second. That the west half of the same lot was granted in fee to Nathaniel Hewson, on the 15th of October, 1829, and were so returned by the Surveyor General, at or about those dates, to the treasurer of the Home District for assessment, and have never been owned by the same person.

Third. That the treasurer opened an account in his books for each half separately.

Fourth. That by such books the taxes appear as follows: Upon the east half from 1828 to 1835, inclusive, one pound twelve shillings and sixpence; and upon the west half from 1830 to 1837 inclusive, one pound twelve shillings and sixpence: that the rates appear paid on said east half from 1835, but uncertain whether 1836 was included.

Fifth. That the treasurer returned lots numbers one and two in second concession, &c., as in arrear eight years, six pounds ten shillings, (which is the amount of taxes on four hundred acres of land for eight years,) without distinguishing one lot or part of a lot from another.

Sixth. That on the 7th of October, 1841, (quære, 1840) the clerk of the peace issued a warrant to the Home Sheriff, reciting that by the account rendered by the treasurer to the Court of Quarter Sessions, according to the statute 4 Geo. IV. (quære, 6 Geo. IV. ch. 7) it appeared that the assessment, or some part thereof, &c., had been allowed to remain in arrear beyond eight years upon the lots and parcels of land afterwards mentioned, and which lots or parcels of land stood *respectively* charged with the sums therein set forth; that is to say, in the township of Mono, west of the centre road, lot No. 1 in the 1st concession, 200 acres, three pounds and five shillings; lots Nos. 1 & 2, 2nd concession, 400 acres, six pounds and ten shillings. And the sheriff was commanded to levy the several sums of money therein mentioned by sale of such portions of the lands on which the said assessments were respectively charged as might be sufficient for that purpose, with fees, &c., duly observing the statute 4 Geo. IV. ch. 7 (quære, 6 Geo. IV.), and 7 W. IV. ch. 19, in respect of such sale, provided there was no distress upon the said lands respectively, from which the said several sums or either of them might be made; and if any such distress, then to levy the same by such distress, &c.—returnable the first Tuesday in July then next. It was admitted this writ issued in October, 1841 (quære, 1840).

Seventh. That the said lots Nos. one and two, &c., were advertised before the sale by the treasurer as in arrear for taxes thus: Lots Nos. one and two in the second concession, west of Hurontario-street, in the township of Mono, six pounds and ten shillings.

Eighth. That at an adjourned sale by the Home Sheriff, on the 5th of January, 1842, the whole of said lot number one was by him put up for sale for three pounds, twelve shillings and sixpence, being three pounds and five shillings arrears of taxes, and seven shillings and six pence expenses, &c.; at

which sale the plaintiff, Ridout, purchased for the said sum of three pounds twelve shillings and six pence the lands now in question, being part of the east half, and no part of the west half of the lot: that by the treasurer's books the arrears of taxes on both half lots appear paid by such sale, and that the sheriff made a deed of the land founded on such sale, dated the 6th of January, 1843.

Ninth. That the right of Seneca Ketchum to said east half was sold by the same sheriff under a writ of *Fieri Facias* against the lands, and purchased by the defendant, Jesse Ketchum, under which he claims to be entitled to the twenty-five acres claimed by the plaintiffs. The sheriff's sale for taxes and deed to the plaintiff Ridout thereunder are not disputed by the defendants.

Ridout afterwards conveyed to Owen, Miller and Mills, who conveyed to Williams, who conveyed to the plaintiff Owen.

The plaintiffs being nonsuited in Michaelmas Term last, A. Crooks, for the plaintiffs, obtained a rule on the defendant to shew cause why the nonsuit should not be set aside.

Dalton, for the defendant, shewed cause during the term. He referred to *Stafford v. Williams*, 4 U. C. Q. B. 488; *Doe Bell v. Reamer*, 3 U. C. O. S. 47; *Doe McGill v. Langton*, 9 U. C. Q. B. 91..

Crooks, in reply, contended that there was an error, which began with the treasurer, and which error was protected by the statute 6 Geo. IV. ch. 7, citing *Doe Bell v. Reamer*, 3 U. C. O. S. 47.

That there is a distinction between this case and the case of *Doe McGill v. Langton*, 9 U. C. Q. B. 91: that if the owner of this lot had come forward after the sale the treasurer would be obliged to receive the amount of the taxes, and the purchaser could have received from the sheriff the difference between that sum and the amount for which it sold.

That the essentials to ground a sale upon were, that the land was granted by the Crown; there were eight years' taxes due, and no distress, and therefore the land was liable to be sold for such taxes, and that the only informality was by the treasurer in not advertising according to the form of the statute—*Doe McGillis v. McDonald*, Easter Term, 4 Vic.;

Doe Bell v. Reamer, ante; Boulton v. Ruttan, 2 U.C. O.S. 262; Doe dem. Stata v. Smith, 9 U. C. Q. B. 658; Jarvis v. Brooke, 11 U. C. Q. B. 302; Jarvis v. Cayley, Ib. 289; Mather v. Priestman, 9 Symes, 352; Cole v. Cole, 6 Hare, 517; Sug. Ven. & Pur. 11th Ed. 68; Lloyd v. Jones, 9 Ves. 37.

Cozens—That the owner of the land would not be prejudiced by any act of the officer—Doe Upper v. Edwards, 5 U. C. Q. B. 568.

That the error was not in the treasurer's books, but in his return to the Quarter Sessions, and the clerk of the Quarter Sessions directed the sheriff to sell under that return: that the whole twenty-five acres were taken off the east half, and that the owner of that half ought to redeem that half and had nothing to do with the west half; and that the twenty-five acres being sold for the taxes due on the whole lot, he ought to be admitted to redeem that twenty-five acres for the amount of taxes due on the east half.

MACAULAY, C. J.—The provincial statute 59 Geo. III, ch. 7, sec. 12, enacted that the Surveyor General should furnish the treasurer with a list or schedule of the lots in every township, &c., as the same are designated by numbers and concessions or otherwise upon the original plan thereof, in which list it shall be specified in columns opposite to each lot respectively to whom the said lot or any and what part thereof has been described as granted by His Majesty, and whether the same or any part thereof be yet ungranted, &c.

Section 13. That all lands described as having been granted, &c., shall, from the time they are returned in the said schedule, be assessed and charged to the payment of the rates or taxes imposed by that act, &c.

Section 14. That the treasurer shall keep an account for every township, &c., according to the list or schedule furnished by the Surveyor General, in which account he shall particularly enumerate every lot or parcel of land in the said township, &c., describing the same as in the said schedule, and shall charge the same with, or credit it for the amount of the taxes and rates payable or paid in respect thereof for each and every year, &c.

Section 15. Rates to accumulate by an increased proportion if suffered to remain in arrear, &c.

The above act was repealed by the 13 & 14 Vic. ch. 66, previous to which however the provincial statute 6 Geo. IV. ch. 7, sec. 6, enacted that the treasurer should at the next general Quarter Sessions of the peace after the 1st of July, 1828, present to the justices in Quarter Sessions assembled an accurate account of all lands in his district upon which the assessments imposed by the several acts of the province, or any part thereof, should have been in arrear for eight years; specifying in such account the lot or parcel of land by the number, concession and township or otherwise, as the same appeared in the schedule furnished to the said treasurer, and specifying also the amount due for assessments thereon, &c., and so in each succeeding year.

Section 7. That upon such accounts so to be made and rendered by the treasurer the clerk of the peace was to make out a writ for levying the assessments appearing to be due in each township, &c., specifying in such writ the particular lot or parcel of land, and the amount due thereon which might be, according to the form given in schedule A of that act, stating the lots or parcels of land with the sum charged against the same in the treasurer's accounts, remaining in arrear up to the expiration of the last year before such account was rendered, by sale of such portions of the lands on which the assessments were respectively chargeable as might be sufficient for that purpose, provided there was no distress upon the lands from whence the same might be made; and if any such distress, then to levy the same by sale of such distress.

Section 12 provided for the manner of selling such lands.

Section 13. Beginning at the first angle on that side from which the lots are numbered and measure backward, taking the requisite portion of the front, &c.—See also sec. 14. Secs. 17 & 18, provided for redemption, &c.

Section 22. No omission of any direction contained in that act, relative to notices or forms of proceeding, previous to any sale made under that act, should render such sale invalid, &c.

The statute 7 Wm. IV. ch. 19, sec. 2, contained further provision respecting the manner of selling lands for taxes, and

required the same to be put up at an upset price of two shillings and sixpence per acre, according to the number of acres necessary to cover the amount to be made, &c.

Section 5 authorized the sheriff to put up any part of the lot liable to be sold for such arrears, &c., as in his discretion he may think best for the interest of the proprietor. This act was also repealed by the 13 & 14 Vic. ch. 66.

The statute 3 Vic. ch. 46, sec. 6, contained additional provisions respecting the subsequent sale where the land did not bring the upset price on the first occasion.

The 13 & 14 Vic. ch. 66 saved the acts repealed so far as the same might affect any rates or taxes that had accrued, &c.

Referring to *Doe dem. Bell v. Orr* (H. T. 7 Wm. IV.), *Doe dem. Bell v. Reamer* (3 U. C. Q. B., O. S. 47), *Stafford v. Williams* (4 U. C. Q. B. 488), *Doe Upper v. Edwards* (5 U. C. Q. B. R. 594), *Perry v. Powell* (8 U. C. Q. B. R. 251), *Doe dem. McGill v. Langton* (9 U. C. Q. B. R. 91), *Doe dem. Stata v. Smith* (ib. 658), *Jones v. Cayley* (11 U. C. Q. B. R. 282) *Peck v. Munro* (4 U. C. C. P. R. 363), I think the power of sale imparted by the statutes not well executed, and the sale invalid. The 59 Geo. III. ch. 7 and 6 Geo. IV. ch. 7 have not been followed in other material points, exclusive of mere omissions of directions contained in the last act relative to notices or forms of proceeding.

It is not enough that the plaintiffs' land was in arrear for taxes to some amount, and that a less amount than that for which it was sold might have been realized from it. The owner would by law be entitled to redeem it on payment of the arrears, &c., to which it was legally liable; but a portion being sold for the arrears due on that and the adjacent half lot, which had been separately granted and returned, was an excess of authority, and exposed the owner to the burthen of paying rates to which his land was not liable to relieve it from that to which it was liable. Surely this lot could not have been sold for all the arrears in the concession or township, and the owner be told it was liable to some arrears and that would sustain the whole sale. It could not require as much land to realize the sum really due upon it as was sold to raise double the amount.

An undivided moiety was unnecessarily sold, and there is no means of separating the part that might have been legally disposed of from the residue unnecessarily sold. The whole being sold without any means of dividing or apportioning the land so sold, it appears to follow that being in part at least illegal, and that part not being separable, the whole sale is void.

McLEAN, J.—The east and west halves of lot number one, 2nd concession, were granted by the Crown to, and have always been owned since by, different parties. They were severally described in the Surveyor General's schedule, and an account opened against each for assessments by the Treasurer of the Home District. Being in arrear, as it is alleged, for eight years, a warrant was issued by the clerk of the peace of the Home District by order of the magistrates in general Quarter Sessions to levy the amount of taxes in arrear, and in that warrant lots numbers one and two in the 2nd concession, 400 acres, are included as being together in arrear to the amount of £6 10s. At the sale, however, the whole of lot number one was put up as being in arrear £3 5s. for taxes and 7d. 6s. for sheriff's fees, and the plaintiffs became the purchasers of the twenty-five acres in question. The taxes on the west half of No. 1 have been levied by the sale of a portion of the east half, though each half of the lot was liable only for its own specific amount of tax. The sale, under such circumstances, was not only irregular, but void. We cannot hold that the sale of part of the east half was valid because taxes were payable on that half lot, inasmuch as we cannot separate one portion of the twenty-five acres sold from the other, and say what portion shall be retained for the taxes due and what shall be given up as improperly sold for the taxes due on the west half of the lot. The same point was involved to some extent in the case of *Peck v. Munro*, recently decided in this court, where a piece of land was improperly sold for the taxes due on another tract, with which it was wholly unconnected. In that case the party holding under the purchaser was in possession and had made improvements, but the proprietor was held entitled to recover against him. In this case the

purchasers are trying to recover possession, but must fail precisely on the same grounds as influenced the decision in that case.

Under these circumstances, I think the nonsuit was right, and that the rule must be discharged.

RICHARDS, J., concurred.

EASTER TERM, 18 VIC.

Present—HON. J. B. MACAULAY, C. J.
HON. A. MCLEAN,
HON. W. B. RICHARDS.

WILLIAM LEDLEY PERRIN V. ALEXANDER HAMILTON.

Commission of bankruptcy—Debt proveable under.

Debt on bond made by the defendant and one W., as sureties for one Shaw, conditioned, that if said Shaw *should not*, from time to time, &c., well and truly pay unto the plaintiff each and every of ten promissory notes, on the respective days on which the same became due and payable, according to the tenor and effect of the said promissory notes respectively, then if the defendant and said W., or either of them, should well and truly, absolutely and at all events, pay or cause to be paid unto the plaintiff each and every of the said ten promissory notes, on the respective days on which the same became payable, then, &c.; otherwise, &c.; assigning breaches as to the last six of the said promissory notes.

Plea, that Shaw did not pay the first and second of the said ten promissory notes when the same became due and payable, according to the tenor and effect thereof, and that thereupon the bond became forfeited; and that afterwards, and while the said notes remained due and unpaid, to wit, on, &c., the said Shaw became bankrupt; and that afterwards, and while the said notes remained due and unpaid, and after the said writing obligatory had become forfeited, the defendant became bankrupt, &c., and that the said debt accrued due and was payable before the defendant became bankrupt.

On demurrer to this plea, on the grounds that the notes which became due after the bankruptcy of the defendant were not proveable under the commission against the defendant under the statute; that the liability of the defendant under the bond was not embraced in the statute, and was not discharged thereby; and that as to the notes which fell due after the bankruptcy of the defendant, the bond at the time of the bankruptcy was not forfeited:

Held, that the bond being forfeited before the defendant's bankruptcy, therefore the penalty became a debt, which the plaintiff might have applied to have retained in the hands of the defendant's assignee till the contingency happened, and then have proved, and that the defendant was discharged, and the plea consequently good.

RICHARDS, J., *dissentiente*.

DEBT, on the joint and several bond of the defendant and one James Wilson to the plaintiff, in the penal sum of one

thousand six hundred and eighty pounds, dated the 14th of April, 1846.

Writ issued 30th of August, 1854; declaration, 12th of September, 1854.

After reciting that one Samuel Shaw had made his ten promissory notes, bearing equal date with the said writing obligatory; and that the defendant and the said Wilson had agreed, jointly and severally, to guarantee the due and faithful payment, according to the tenor and effect thereof respectively, and that five of the said promissory notes were made payable to the plaintiff or order at the Branch Bank of Montreal, Toronto, at one, two, three, four and five years after date; and that other five of the said promissory notes were stock notes, made payable to the plaintiff in good merchantable axes at the market price, but not to exceed three pounds fifteen shillings per box, payable at the establishment of Messieurs William Ledley Perrin and Company, at Toronto, at one, two, three, four and five years after date; and that the defendant and said Wilson had agreed to become, and by the said writing obligatory did become jointly and severally sureties for the due payment as well of the said five negotiable promissory notes therein and hereinbefore firstly mentioned, as of the said five stock notes therein and hereinbefore lastly mentioned, according to the tenor and effect of the said ten notes respectively, such payment being intended by the defendant and said Wilson to be secured by them absolutely and at all events: it was conditioned, that if the said Samuel Shaw, his executors, &c., should *not* from time to time, &c., well and truly pay or cause to be paid unto the plaintiff, his executors, &c., each and every of the said ten promissory notes, on the respective days on which the same became payable, according to the tenor and effect of each of the said ten notes respectively; *then*, if the defendant and said Wilson, or either of them, their or either of their heirs, executors or administrators, should well and truly, absolutely and at all events, pay or cause to be paid unto the defendant, his heirs, &c., each and every of the said ten notes, on the respective days on which the same respectively became due and payable, according to the tenor and effect thereof, then the said writing

obligatory should be void, &c.; otherwise, &c. The declaration then assigns for breaches, that on the 17th of April, 1849, a large sum of money—to wit, the sum of one hundred and eighteen pounds—secured by the promissory note for that sum in the said writing obligatory mentioned, became and was due, and owing, and payable from the said Shaw to the plaintiff, but that neither the said Shaw, although afterwards thereunto duly requested, nor the said Wilson, nor the said defendant, who afterwards had due notice of the default of the said Shaw, paid the same or any part thereof to the plaintiff; and the same is and remains in arrear and unpaid, contrary to the tenor and effect of the said writing obligatory. The declaration then assigns five other breaches as to the remaining notes, payable in axes and money, and concludes—by means of which said several breaches the said writing obligatory became forfeited, and an action hath accrued to the plaintiff to demand, &c.; yet, &c.

The bond being set out on oyer in the same terms as in the declaration, the defendant pleaded, first, that the said Shaw *did not* pay the said promissory notes *firstly* and *secondly* in the recital of the said writing obligatory mentioned, when the same became due and payable, according to the tenor and effect thereof, and that thereupon the said writing obligatory became and was forfeited; and the defendant further saith that afterwards, and while the said promissory notes remained due and unpaid—to wit, on the 1st of June, 1848—the said Shaw became a bankrupt, within the true intent and meaning of the statutes then in force concerning bankrupts, and that afterwards, and while the said promissory notes remained due and unpaid, and after the said writing obligatory had become forfeited, and before suit—to wit, on the 24th of June, 1848—the defendant became a bankrupt, within the true intent and meaning of the statutes then in force concerning bankrupts, and that the said debt accrued due and was payable, and the causes of action in respect thereof accrued to the plaintiff, before the defendant became a bankrupt—concluding to the contrary.

Demurrer to plea, on the grounds, first, that the promissory notes in the said writing obligatory mentioned, which became

due and payable after the bankruptcy of the defendant, were not proveable under the commission of bankruptcy against the defendant under the statutes then in force concerning bankrupts; secondly, that the liability under said writing obligatory was not embraced within the true intent and meaning of the said statutes, and was not discharged thereby; thirdly, that as to the promissory notes which fell due and payable *after* the bankruptcy of the defendant, the said writing obligatory, at the time of the said bankruptcy of the defendant, was not forfeited.

The demurrer was argued during last Hilary term, when *McDonald*, for the demurrer, contended that the defendant, having become bankrupt after default in the payment of the four first-mentioned notes, and for which the plaintiff was not proceeding in this action, did not discharge the bond, which remained still in force, to secure the last six notes, for which this action is brought; and that such six notes having become due since the bankruptcy, were not proveable under it, but the plaintiff remains at common law on the bond, subject to the suggestion of breaches under the statute 8 & 9 Wm. III. ch. 11, sec. 8: That the plaintiff might, before the bankruptcy, have sued the defendant on the bond, by reason of the former breaches, and recovered judgment for the whole penalty; and had he done so, his course now would have been by *scire facias*, suggesting further breaches under the statute to obtain execution therefor: That the English bankrupt acts and ours differ, as a comparison shews,—that the Imperial statute 6 Geo. IV. ch. 16, specified three classes of debts proveable thereunder; first, all debts due; second, all debts certain to become due; and, third (sec. 56), all debts contracted, payable on contingencies, and capable of valuation before such contingency happened; and that our statute provided for the two first only, and not for the third or last; that it (the provincial statute 7 Vic. ch. 10, sec. 35) provided for eleven species of debts or demands, enumerating them, but not including debts payable on a contingency not yet happened. He cited *Ex parte Adney*, 2 Cow. 476, A. D. 1776; *Johnson v. Compton*, 4 Sim. 37, 1830; which last was the case of a covenant to secure an annuity granted by another person:

That no debt was due as a debt, but the bond constituted only a security or liability—Lane v. Burghart, 4 Scott, N. R. 294 ; S. C., 3 M. & G. 597 ; Millen v. Whittlebury, 1 Camp. 428 ; Yallop v. Ebers, 1 B. & Ad. 698 ; S. C. 1 Leb. Ob. 317,—that the plaintiff could not have sworn to any debt, or been a good petitioning creditor ; and that the only clause in our statutes that relates to sureties is not applicable, and that the present demand was not a debt proveable under the commission.

Vankoughnet, Q. C., against the demurrer, distinguished a penal bond forfeited by partial breaches of the condition before the bankruptcy from other contracts by parol or sealed, and contended that upon the first breach the penalty had become a debt at law ; and that, being previous to the defendant's bankruptcy, it was proveable accordingly. He relied strongly upon the case of *The Skinners Co. v. Jones*, 3 Bing. N. S. 481, as much in point in governing this case, and referred to Archbold on Bankruptcy, p. 126–7, for the authorities bearing on the subject.

McDonald, in reply, said a judgment was stronger than a bond, and yet a judgment was not recognized as a debt in *Johnson v. Compton (supra)* ; that to be admitted to proof, the creditor must swear to the amount due, and could not do so here ; that the case cited on the other side was an absolute undertaking—not contingent, as if the other party *should* pay, but that he *shall* pay—while here it was strictly conditional, if Shaw did not pay the defendant would. He also cited *Willoughby v. Swinton*, 6 East, 550, that it was a case within the statute requiring breaches to be assigned, &c., and not one in which the plaintiff was entitled to the whole penalty as a debt when the act of bankruptcy was committed.

At the second argument, with reference to the provincial statute 9 Vic. ch. 30, sec. 32, not cited at the first argument, *McDonald*, for the plaintiff, contended the penalty was not a debt proveable in bankruptcy, but that the condition was looked to, and that in this case no debt arose out of the terms of the condition, except as it accrued by each successive default : That in *The Skinners Co. v. Jones* the defendant was a principal, not a surety, which made all the difference, as that case shewed, which was held not to come under the 6

Geo. IV. ch. 16, sec. 56, which bears close resemblance to our own act 9 Vic. ch. 30, sec. 32. So, he argued, in the case of Willis, 4 Ex. R. 630, the defendant was a principal contractor, not a surety for or at the instance of another person, nor were the facts in other respects identical with the present case. He submitted there was no substantial distinction between the 56th section of the Imperial act and the 32nd section of our own act, and that at all events the plaintiff was entitled to recover the amount of the stock notes, which notes he could not have proved in bankruptcy, the amount sounding entirely in damages, and necessarily requiring the intervention of a jury to ascertain it; and if so, it was an answer to the defence in this demurrer.—4 Bing. 209. As to the money notes, he again urged that their amount did not constitute a debt contracted, but only a contingent liability, a mere liability to become indebted: that to create a debt contracted, payable on a contingency, it must be capable of valuation before the contingency happened, as if under section 56 of the Imperial statute: that before such contingency happened no such valuation could have been placed upon them in this case; and not having happened before the bankruptcy, the plaintiff could not have been let in, and is therefore not barred this action: that the cases under the first part or clause of the 56th section of the Imperial statute, are to be applied to the 32nd section of the Provincial act, and govern the question whether it was a debt contracted or not; and that they shew it was not, but a mere contingent liability: that when one contracts as a principal, it does not form a contingent debt, as it does in the case of a surety, or that in the latter case it constitutes only a liability as distinguished from a contingent debt, if the former may be so regarded. Until the event, it remains a contingency whether the surety will ever become indebted at all. He likewise submitted that the plaintiff had an election to seek relief in bankruptcy, or to await the contingency and sue at law, referring to 6 Geo. IV. ch. 16, sec. 59, and *Ex parte* Marshall, 1 M. & A. 126.

Vanhoughnet, Q. C., in reply, again relied upon *The Skinners Co. v. Jones* as conclusive in the defendant's favor, and upon the late case of *Arnott v. Holden*, 17 Jurist, 318, and

contended that the defendant here was as much a principal as the defendant in the first case, and less a surety than the defendant in the last case; that contingent liabilities arise where there is no debt certain, due, or payable by any one, as annuities, when the liability of the principal to become indebted depends on the contingency of the annuitant living at the time the annuity accrues and becomes due and payable; but that persons guaranteeing the payment of debts certain, contract debts payable on a contingency, that they espouse the debt, or its payment, which is the same thing, but only oblige themselves to pay it contingently, in the event of the party primarily or concurrently liable to pay it failing to do so: that here the language used in the condition is peculiarly emphatic as respects the defendant's undertaking to pay, although only contracting as surety for Shaw. Further, that the bond having been forfeited before the bankruptcy, brought it within the cases on that head; that had the contingency happened before the bankruptcy, or even afterwards before it became too late to prove, the plaintiff might have proved, according to the whole current of authorities relating to the Imperial statute 6 Geo. IV. ch. 16, sec. 56; and that the defendant's bond having been in fact forfeited before the bankruptcy, not only might the plaintiff have proved against him for prior defaults, but might, as that very circumstance shewed, have applied to have the residue retained to abide the event of the contingency: that section 82 of the provincial statute was on this head quite different, and went farther than section 56 of the Imperial statute, which before the contingency only let in proof of contingent debts capable of valuation before the contingency happened; whereas our act admits contingent debts not capable of valuation in anticipation of the contingency, to be retained, if, as in the present case, they would become debts payable when the contingency happened, and proveable under the last clause of the Imperial statute: that the amount is ascertained on the face of the condition, both as to the money and the stock notes, and the whole might have been claimed and allowed in bankruptcy, by reason of the forfeiture of the bond, if not otherwise; and the defendant's plea therefore is good.

MACAULAY, C. J.—The provincial statute 7 Vic., ch. 10, sec. 35, enacted, first—That all debts due and payable by any bankrupt at the date of the commission against him may be proved and allowed against his estate. Second—And all debts then absolutely due, although not payable until afterwards, may be proved and allowed as if payable presently, with a discount or rebate of interest when no interest is payable by the contract until the time when the debt would become payable. Third—And all monies due by any bankrupt on any bottomry or respondentia bond, or on any policy of insurance, may be proved and allowed in case the contingency or loss should happen before the declaring of the first dividend, in like manner as if the same had happened before the date of the commission. Fourth—And in case the bankrupt shall be liable for any debt (first) in consequence of having made or endorsed any promissory note or bill of exchange, before the date of the commission; (second) or in consequence of the payment by any party to any bill or note of the whole or any part of the money secured thereby, (third) or of the payment of any sum of money by a surety of the bankrupt in any contract whatsoever, although such payment shall in either case be made after the date of the commission, provided it be made before the declaring of the first dividend, such debt shall be considered for all the purposes of this act as contracted at the time when such bill or note or other contract shall have been so made or endorsed, and may be proved and allowed as if the said debt had been due and payable by the bankrupt before the date of the commission. Fifth—And also any claim or demand by or in right of the wife of the bankrupt, founded on her contract of marriage with the bankrupt, and which is valid as against creditors, &c., or for or in relation to her separate property. Sixth—And all demands against the bankrupt for or on account of goods or chattels wrongfully obtained, taken or withheld, may be proved and allowed to the amount of the worth of the property; and no debt other than those above mentioned shall be proved or allowed against the estate of any bankrupt.

Section 59. Every bankrupt who shall appear and obtain a certificate, &c., shall be discharged from all debts due by him

at the date of the commission, and from all claims and demands made proveable under the commission.

Section 64. And from all liability to be sued in respect thereof, &c.

Section 66. When dividend paid, a reserve may be made, for sufficient reasons, to meet unproved debts, &c.

By the statute 9 Vic. ch. 30, sec. 30: Any person who at the issuing of the commission shall be surety, or liable for any debt of the bankrupt, or bail for him, &c., if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission issued, shall (if the creditor has proved) stand in his place; or if not, such surety, or person liable, or bail, may prove, &c., subject to the provisions therein contained—See the Imperial statute 6 Geo. IV. sec. 52, a like clause.

Section 32. If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom the debt has been contracted may, if he think fit, apply to have the same retained in the hands of the assignee until the arrival of such contingency, or until it be ascertained that it cannot arrive; and such person may, after such contingency shall have happened, prove in respect of such debt and receive dividends, not disturbing former dividends, &c.

The Imperial statutes 5 Geo. IV. ch. 98, sec. 54, and 6 Geo. IV. ch. 16, sec. 56, contain clauses nearly similar to the last.

The statute 8 Vic. ch. 48, sec. 5, authorizes a final order under the act for the relief of insolvent debtors, to operate as a discharge of all debts due up to the day of filing the petition, as fully and completely and to the same extent as if such trader had obtained a certificate under the 7 Vic. chap. 10, sec. 59.

Two cases have been relied upon as peculiarly applicable to the present case. First, *The Skinners' Company v. Jones* (3 Bing. N. S. 481), relied upon by the defendant, is much in point. A bond executed by the defendant, as surety for another, dated the 1st of March, 1882, was conditioned for payment of five pounds, interest on a principal sum of two

hundred pounds, on the 1st of March, 1833, and on the 1st of March, 1834, and two hundred and five pounds on the 1st of March, 1835. The first year's interest was not paid till the 30th of March, 1833, whereby the bond became forfeited at law. In June, 1833, the defendant became bankrupt; and it was held, in an action afterwards brought on the bond, to which the defendant pleaded his bankruptcy, that the bond was proveable under the defendant's commission. It appears the condition was, that if the principal (Butler) paid the two hundred pounds and interest as aforesaid, or in case the said Butler should, during any part of the said three years, &c., fall into decay by riot, ill-husbandry, or any dishonest or immoral conduct, then if said Butler should well and truly pay, or cause to be paid on demand, unto the plaintiffs, the full sum of two hundred pounds, with interest at the rate aforesaid, the bond should be void, &c. The court decided against the plaintiff, irrespective of the statute 6 Geo. IV. ch. 16, sec. 56, on the ground that the bond was forfeited at the time of the bankruptcy, and might then have become the subject of proof against the defendant's estate. In this case the defendant was a party to the bond of the principal, though manifestly given as a security only. Second—The case of *Arnett v. Holden* (17 Jur. 318), S. C. (22 L. J. N. S. Q. B. 14), and 16 Eng. Rep. (142), which was a debt on an annuity bond in the common form. The bond was dated on the 19th of June, 1828, and made by one Mather and the defendant, to the plaintiff, in the penal sum of three hundred pounds. The condition recited that Mather had agreed with the plaintiff for the sale to him of an annuity of twenty pounds a year during the lives of the plaintiff and wife and of the survivor, for the price of one hundred and fifty pounds: that the said Mather had requested the defendant to join in the said bond for securing the said annuity of twenty pounds, which he had consented to do, and the condition was, that if the said Mather or the defendant, or either of them, paid to the plaintiff during life as aforesaid the annuity of twenty pounds by two half-yearly payments on the 9th of June and December, then, &c. Breach, in replication: fifty pounds due for two and a half years' annuities, &c. The pleas were—The Statute of Limitations

and bankruptcy of the defendant after bond and before suit, and that the cause of action accrued before such bankruptcy.

The facts were, that the defendant became a bankrupt in 1836: that Mather paid the annuity half-yearly down to 1848, but never till after the days appointed therefor; so that breaches of the bond had taken place before the defendant's bankruptcy and more than twenty years before the commencement of this action, which was for arrears of the annuity since 1848. It was held that the Statute of Limitations was *in-bar*, and that the plaintiff was entitled to recover notwithstanding such bankruptcy.

Mr. Justice Wightman differs from *Lord Campbell* and *Mr. Justice Erle* upon the question whether the defendant was to be regarded as a principal in the bond, or only a surety to secure the annuity, but all agreed that if to be looked upon as a surety only he could not set up his bankruptcy as a bar to the breaches of the bond incurred since his bankruptcy, because the condition had been previously broken by reason of the non-payment at the day of the annuities that came due in previous years. The plaintiff's counsel referred to the case of *The Skinners' Company v. Jones* (3 Bing. N. S. 481), and said it was difficult to see on what ground that decision proceeded, and that the point as to the possibility of valuing the liability was not presented to the court, and endeavored at all events to distinguish it. *Erle, J.*, said it would be contrary to the system of bankruptcy to allow proof for the penalty in all cases of bonds for the performance of promises where there has been a nominal breach but nothing due, and to make the assignees liable indefinitely to claim for a dividend in case of a future breach.

This was the case of an annuity, and annuities have always been treated as a class not identical with or governed by the rules that usually apply in ordinary debts or money demands between principal and surety, where a specific debt is contracted by the principal. This case, however, shews that the penalty is not looked upon as the debt in bankruptcy; though if the condition be broken and the bond forfeited at law, it may enable the obligee to prove under circumstances that would not be allowed before breach of the condition.

As an agreement to pay money or to answer the default of another, the condition is looked to as expressing the undertaking and the amount of liability, &c.

That the penalty of a bond is not to be taken as the debt in bankruptcy I think the cases establish—*The Churchwardens &c. of St. Martin v. Warren*, (2 Star. 188), S. C. (1 B. & A. 491), *Taylor v. Young*, in Error (3 B. & A. 521), *Ex parte Marks* (3 M. & A. 521), *Utterson v. Vernon* (3 T. R. 546), *Hodgson v. Bell* (7 T. R. 97). And as to the Statute of Limitations, see *Sanders v. Coward* (15 M. & W. 56), *Blair v. Ormond* (15 Jur. 1054, S. C. 7 Eng. Rep. 318).

But, when forfeited before the bankruptcy, it may often let in a creditor to prove, who would, before breach, be excluded—*Tully v. Sharkes* (2 Lord Ray, 1546), *Perkins v. Kempland* (2 Blk. Rep. 1106), *Wyllie v. Wilkes* (Doug. 519), *Ex parte Groome & Winchester* (1 Atk. 118), *Hancock v. Entwisle* (3 T. R. 446), *Brooks v. Lloyd* (1 T. R. 17), *Hodgson v. Bell* (7 T. R. 97), *Arnott v. Holden* (16 Eng. Rep. 148, S. C. 17 Jur. 318), *Westcott v. Hodges* (5 B. & A. 12), *Brown v. King* (8 T. R. 389), *Butcher v. Churchill* (14 Vez. 567), *Ex parte Marks* (3 M. & A. 521), *Marshall v. Fox* (2 Dea. & Ch. 587, S. C. M. & A. 118). And it would seem that when the condition relates to one or more matters that at once exhaust the whole object of the security, the bond, if proved for part, must be extended to the whole, and cannot be afterwards put in suit in an action at law for the residue—*Taylor v. Young* (3 B. & A. 527), *Utterson v. Vernon* (3 T. R. 548), *Atwood v. Partridge* (4 Bing. 209), *Brown v. King*, (8 T. R. 389).

In the case before us the bond was forfeited before the defendant's bankruptcy, but it is clear the defendant was a surety or guarantee only; and the difficulty is to determine whether he contracted a debt, payable on a contingency, within the meaning of the bankrupt laws, or only a contingent liability to become indebted.

The condition provides for two descriptions of debts. In the first place, it guarantees the payment of five promissory notes, payable in money at certain named days. In the second place, it guarantees the payment of five other sums at fixed

days, not in money, but in axes at the market price, not exceeding £3 15s. per box. Two questions are therefore presented—namely, first, whether the defendant contracted a debt, payable on a contingency, in relation to the notes payable in money; second, whether he did so in relation to what are in the condition of the bond termed stock notes. First, then, as to the notes payable in money, a peculiarity in the wording of our statute 9 Vic. ch. 30, sec. 32, as compared with the Imperial statutes 6 Geo. IV. ch. 16, sec. 56, and 12 Vic. ch. 106, sec. 177, is to be borne in mind. The Imperial acts provide that if any bankrupt shall, before the issuing of the commission, have contracted any debt, payable upon a contingency which shall not have happened before the issuing of the commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and who are required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value be not so ascertained before the contingency shall have happened, then such person may after such contingency shall have happened prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends—See the Provincial statute, ante p. 65. A comparison of the two will shew that the various cases in England which have turned upon the difficulty of placing a value upon the contingency by any tangible data before the contingency has happened, as may be done in cases of debts absolutely due, though payable at a future period, or upon annuities for the lives of the annuitants, do not apply here,—our act not requiring the contingent debt to be valued, but the same to be retained until the contingency happen, &c.; whence it follows that if a specific sum constitutes the debt there can be no difficulty in retaining it, subject to the contingency, however incapable of previous valuation such contingency may be.

The Imperial statute 12 Vic. ch. 106, sec. 178, contains an express provision extending the right to claim and prove for a liability to pay money on a contingency, as distinguishable from debts contracted payable on a contingency, provided for

in the 177th section. The distinction between debts payable on contingencies and contingent liabilities to become indebted had been previously noticed in several of the adjudged cases, and the effect given to such distinction no doubt led to the adoption of the 178th section in the last statute. Some of the cases in England will be found to turn upon the first branch of the 6 Geo. IV. ch. 16, sec. 56, and others upon the second; and debts have, under the latter branch, been admitted to proof after the contingency has happened, though subsequent to the bankruptcy, that would not have been admitted under the former branch while the contingency remained *in dubio*, principally by reason of the impossibility of valuing the contingency in the one case, which was obviated by the event in the other. The two clauses in section 56 did not therefore seem to be considered as convertible; and after the contingency occurred it was not made a test in the question whether the creditor could be allowed to claim and prove after the contingency or how far he could have been admitted to have had a value set upon the debt pending the contingency; and this distinction is material to the present case, in which the question is, whether that which is secured by the defendant's bond constitutes, after a partial breach and technical forfeiture of the bond, a debt contracted by him, payable on a contingency, the amount of which might be retained until it was known whether the contingency would result in absolute liability or total exoneration.

Under the Imperial acts the question may arise under two distinct aspects; here only under one. If the defendant's bond was to be determined by analogy to the first clause of the Imperial statute, section 56, and the decisions relative thereto, I should be disposed to say that, notwithstanding the forfeiture before the bankruptcy of defendant, it could not in bankruptcy be treated as a debt payable on a contingency, because until the still pending contingencies happened it would be incapable of estimated valuation. But, seeing the grounds on which debts under that clause have been rejected, and then turning to the cases in which similar demands have been, under the second clause, sustained after the contingency had happened, I arrive at the conclusion

that this case is to be determined by reference to the last clause, and not the first. It depends therefore upon the question whether this be a debt payable upon a contingency or only a contingent liability to become indebted if there really be any difference—that is, if they are distinguishable and can be distinguished.

Without here noticing the numerous and somewhat conflicting cases bearing on this alleged distinction, and without, in the first instance, placing reliance upon the fact that the condition of the defendant's bond had been broken in relation to the notes of both kinds before the bankruptcy, it appears to me that a few cases govern and decide the present—that is, looking at the condition of the bond as containing the defendant's contract under seal, and as constituting a valid and binding agreement irrespective of the penal parts.

Assuming, then, as I do, that the defendant thereby guaranteed or became surety for the payment of Shaw's notes as therein mentioned, the point seems to be, whether a person guaranteeing or becoming security under seal for the payment of promissory notes made concurrently or of equal date therewith by a third person, payable to the covenantee, can be said to contract a debt payable on a contingency within the true intent and meaning of the bankrupt act now under consideration. The cases of *Ex parte Lewis* (1 M. & McA. 426), *Ex parte Myers* (M. & Bl. 229), *Ex parte Simpson* (1 M. & McA. 544, S. C. 3 D. & C. 202), *Ex parte Myers v. Myers* (12 Jur. 647 & 648, *note*, and others therein mentioned), go to establish the affirmative of this proposition; and those cases and the proposition itself seem to have been broadly confirmed by the case of *Ex parte Willis* (4 Ex. R. 530). It was a case sent for the opinion of the Court of Exchequer by Vice-Chancellor *Knight Bruce*.

One Dutton, as agent of Brook & Sons, contracted to sell a certain quantity of wool at a specific price to Wilkins & Evans, but not being satisfied with their sufficiency, Willis (the bankrupt), in consideration of a commission of one per cent., apparently at the invitation of Brook & Sons, who paid the one per cent., agreed to guarantee one half of the amount of the wool. The contract note sued by Dutton was

There is no doubt the difficulty that it cannot be said of it technically or without qualification, that it is a debt *debitum in præsentì solvendum in futuro*, and it is the case of principal and surety, and not of a primary undertaking; still it appears to me to resemble in effect the case of *The Skinners Company v. Jones*. It is *debitum in præsentì solvendum in futuro* upon a contingency, but only so payable contingently, not absolutely. I consider it immaterial whether the defendant entered into the bond at the request of Shaw or not. It does not say he did; but the condition shews that he gave the bond only to guarantee the payments. Nor do I think that Wilson being a joint and several party in such bond materially affects the question. Looking at the condition then as a covenant or sealed agreement apart from the penalty of the bond, it recites that the defendant agreed to guarantee the due and faithful payment of the promissory notes therein mentioned, such payment being intended and meant by him to be secured by him absolutely and at all events. And then he agrees that if Shaw should not from time to time well and truly pay to the plaintiff each and every of the said ten notes respectively, the defendant should well and truly, absolutely and at all events, pay each and every of the said ten promissory notes on the respective days on which the same became due and payable, according to the tenor and effect of each of the said promissory notes.

The defendant is not a party to the notes which the recital speaks of as having been made by Shaw, bearing equal date with the bond; he is not therefore the principal or a principal debtor—he only guarantees the debt of another, but he does so in terms, that, for the purposes of proof under the bankrupt act, seem effectually to make it his debt or to make himself debtor in a debt payable on a contingency. He certainly contracts something; and, transposing the words of the condition without infringing upon their legal import or effect, that something is, that he undertakes under seal well and truly, absolutely, and at all events to pay the amount of the promissory notes that had been made by Shaw to the plaintiff on the days on which they became due and payable, if Shaw did not.

able, and *Ex parte* to Marshall in *Re Fox* (Mont & B. 242, S. C. 2 Dea. & Ch. 589, and 1 M. & A. 118), as throwing doubt upon *Ex parte* Myers; and, without expressing any opinion whether the last case was rightly disposed of or not, said, "the question before us is the same as in the *Ex parte* Myers, and we think that case was rightly decided, and that a claim on a guarantee for a sum certain when due is proveable as a debt, and before it is due is provable as a debt due on a contingency."

Now this language is explicit; but the case *Ex parte* Minet (14 Ver. 189), mentioned as a strong authority in support of the opinion expressed, does not appear to me to be so; for the language of *Lord Eldon*, though much in point, is not used with a view to the question raised in *Ex parte* Willis, and is not therefore of the same weight as if the cases had been identical.

And *Ex parte* Myers, when closely examined, is not so precisely in point as was assumed; and the further consideration of that case in *Ex parte* Simpson (3 Dea. and Chy. 792, 1 M. & A. 544), which is not alluded to by the Court of Exchequer, shews wherein the two cases are distinguishable. Moreover, so far as the *Lord Chief Baron* lays it down that a claim on a guarantee for a sum certain before it is due is proveable as a debt due on a contingency, I apprehend it is contrary to the current of authorities.

The subsequent case of *Hawkins v. Bennett* (8 Ex. R. 107), which turned upon the distinction between contingent liabilities and contingent debts in reference to the first clause of 6 Geo. IV. ch. 16 sec. 56, and in which *Ex parte* Willis was referred to, seems to me to approve of the decision,—at all events, contains nothing to shake its authority so far as it relates to a debt guaranteed after the contingency happened—See *Re Littlejohn* (7 Jur. 378, S. C. 12 L. J. N. S. Bankruptcy 31).

Relying however to this extent, upon the authority of *Ex parte* Willis, that the guarantee after the contingency happened constituted a debt, and, judging as well as I can by what I take to be the spirit or result of the cases, I come to the conclusion that the defendant did in this case contract a debt payable on a contingency.

that the rule that a surety contracts only a liability to become indebted, and a debt payable contingently, (if there be any difference) is so general that no words can at the same time create the relation of principal and surety and render the surety a party contracting a debt payable on a contingency, within the meaning of the Bankrupt Act.

If it remained otherwise doubtful, however, I think the fact of the bond being forfeited before the defendant's bankruptcy put an end to all further question; for although the penalty would not be adopted as a debt for the purpose of dividends in the Court of Bankruptcy, it constituted a legal debt for which he might obtain a judgment at law, and would let in the plaintiff to claim in bankruptcy that the sums secured by the bond should be retained to await the event of the contingencies still existing in relation to the notes not due at the time of the bankruptcy, as execution would be suspended upon a judgment at law under the statute of Wm. III. He certainly might and would have been bound to claim and to prove for the notes that had become due before the bankruptcy, or be barred after defendant obtained his certificate; as to those not due at the time of such bankruptcy there was nothing to estimate, value or reckon, these promissory notes, (mentioned in the 1st, 3rd, and 5th breaches) for specific sums payable at fixed days were secured; and the only contingency was whether Shaw would pay them at the days, in time to relieve the defendant from his undertaking to do so, if Shaw did not;—the days were soon to happen, and were not very remote, and these sums might have been retained; the condition of the bond having been previously broken, the plaintiff might certainly have proved *quoad* the over-due notes, and on the same principle might have applied that the amount of those not yet due should be retained.

Another contingency might be the market price exceeding £3 15s. a box, when it would be an advantage to the plaintiff to be paid in axes instead of money.

In an action on the bond the plaintiff could no doubt be obliged to assign or suggest breaches under the statute 8 & 9 Wm. III. ch. 11, sec. 8, both in relation to the cash notes and to the stock notes; and it is not therefore a conclusive test of

the creditor's right to prove in bankruptcy that if compelled to sue at law he must state breaches under the statute and go to a jury to assess the amount of each successive breach. If it were so, no debt could be proved against a bankrupt surety or guarantee: and yet it has been held that after default by the principal, such claims might be proved as debts. I take the principal test to be certainty in the amount to be paid.

Then, as to the notes payable in axes, there is still more difficulty; because if the transaction was such that it might require the intervention of a jury to assess the amount, it would be a demand sounding in damages, and not a debt payable contingently. Stock notes (as they are called) may in one sense be said to constitute only written evidence of an executory contract to deliver goods, &c., (as axes) to a certain amount at a future day. Of course they are not promissory notes, properly speaking, and are executory; but still a specific amount was to be paid, not in money, but in axes.

It is a *modus solvendi*, and payment may be made in goods, if so agreed and accepted—*Cannan et al. Assignees of Healy v. Wood* (2 M. & W. 465), *Davies v. Wilkinson* (10 A. & E. 98), *Green v. Bricknell* (8 A. & E. 701).

It is said debt will lie for specific goods.—*Cheney's case* (3 Lev. 260, S. C. 4 Lev. 46); 1 Chy. Pldg. 101; *Dyer*, 246; Com. Dig. A. 5; Ba. Ab. Debt. F.; *Earl of Falmouth v. Penrose* (6 B. & C. 385); *The Mayor of Reading v. Clarke* (4 B. & A. 268); *Harrison v. Matthews* (10 M. & W. 768); *Evans v. Jones* (5 M. & W. 295); *Randall v. Rigby* (4 M. & W. 130); *Powell v. Ancell* (3 M. & G. 171, 4 Scott N. R. 208-611). ●

The P. S. 3 W. IV. ch. 1, sec. 22, reciting that it was customary among the people of this province to contract for the payment of a certain specified amount, or of certain sums, in produce or labor, or in some manner otherwise than in money, and that doubts might arise with the commissioners of the Court of Requests whether they could adjudge such amount or sums to be paid in money, enacted that in any such case, after the day was passed in which produce or goods should have been delivered, or other thing should have been done, it should be in the power of the court, if they found it

just in other respects, to give judgment for the amount in money, as if the debt or agreement had been for money—See 13 & 14 Vic. ch. 53 (latter part), to the same effect.

It may be said such a special provision shews that a special promise of this kind constituted no debt at common law; and it certainly did not. The promise to pay in axes may be founded on a sufficient consideration on plaintiff's part to support an executory contract by defendant's principal Shaw to deliver axes which the plaintiff may have desired to purchase: or, if the promise to pay in axes may be a mere unexecuted accord, founded on a past consideration, without any new concurrent consideration on plaintiff's part as agreeing to forbear and give day in consideration of being then paid in axes,—so as to extinguish the previous debt, and absorb it in a new executory contract for axes to the amount thereof. It may have been as to the plaintiff a mere gratuitous promise, implied for accepting the notes, to accept satisfaction of an existing debt in axes, and so *nudum pactum*.

But, however that may have been as between the plaintiff and Shaw, I think the defendant's sealed undertaking that he would so pay if Shaw did not, bound him, without regard to consideration, to see that Shaw did so pay or so to pay himself.

As against Shaw the plaintiff could only recover by a special action of assumpsit in the superior court, in which a consideration must be alleged, if not expressed in the notes, and the recital in the condition to the defendant's bond does not import that any consideration is therein expressed; and if not, and a valid consideration could not be alleged, or, if denied, could not be proved, the plaintiff could not recover against Shaw for not paying in axes.

As against the defendant, the plaintiff's remedy would be upon the bond, in which action it would only be necessary to allege a default in Shaw to pay at the days according to the tenor and effect of the notes. I do not suppose it would be a defence open to the defendant that according to the tenor and legal effect of the stock notes Shaw was not bound or liable to pay them at all for want of mutuality of consideration to sustain his executory promise; and if not, that the defendant would not be liable on Shaw's default for the

amount expressed in such notes. Then it may be said disputes might arise touching the performance of such promise on Shaw's part that would require the intervention of a jury in actions against either Shaw or the defendant; that Shaw or the defendant might allege payment in axes or a tender of good merchantable axes at the market price, not exceeding £3 15s. a box, or as to what a box means; but the plaintiff might deny acceptance or payment or any tender, or dispute the quality of the axes or the price claimed as not being the market price, or the market price might exceed £3 15s. a box, and the plaintiff claim nevertheless to be paid or satisfied in axes at a price not exceeding £3 15s., and seek to recover as damages the difference between £3 15s. and the market price, in addition to the amount specified in the notes. Such guarantee, it may be contended, the plaintiff could not, under such circumstances, have proved in bankruptcy against Shaw—his whole demand sounding in damages;—and if not against Shaw then not against defendant, on the same principle; at least not without electing to relinquish his claim to recover or prove for anything more than the face of the notes. Wherefore if he either could not, or was not bound to, claim and prove in bankruptcy, whether as against Shaw or the defendant, he could not, at the risk of estoppel, so proceed for the amount of the notes payable in money, and might therefore reserve the whole demand to be prosecuted at law.

As to election, the cases seem to shew that if the suit at law or in equity, is for that only which might be proved in bankruptcy, the creditor cannot recover against the bankrupt after he is discharged by certificate under the statute, even although he might have proceeded at law in a form of action, shaping his demand in a form that could not have been available in bankruptcy, as for special damages for breach of a special promise, &c. Still, if in the end Shaw failed entirely, no such question would arise as above supposed, and some of the objections might equally apply in the simplest debts. The execution of a bond, note, or bill, or presentment, or notice of dishonour or the delivery of goods, &c., might be denied; or tender, payment, accord, satisfaction, release, &c., might

be alleged. Questions of disputed facts may frequently arise in the course of the proofs of debts undoubtedly proveable under commissions of bankruptcy. And as to the special damage in addition to the principal sum mentioned in, and secured by, the stock notes, the case of *Vansander v. Corbie* and another (3 B. & A. 13) shews that even if the plaintiff could insist upon axes at £3 15s. a box, though the market price exceeded that sum, and could recover the difference as special damages in a special action for the non-delivery of the axes at £3 15s. a box, still that such damages would be only accessory to and consequential upon the principal debt, and that a separate action could not be maintained therefor, either after an action at law for the principal debt, or after proving such debt in bankruptcy.

This case suggests that the right of election may be abridged and confined to cases in which the creditor has choice of remedies by either of two separate forms of action, and not where he has but one choice of action at law for the principal demand, although recoverable under a count differently framed from that which would be necessary to embrace the special damage. At all events it is a strong authority to shew that the contingency of the plaintiff being entitled to receive payment in axes at £3 15s. a box at a time or times when the market price might exceed that sum—if he would be peremptorily so entitled—is not a sufficient reason for his not claiming and proving in bankruptcy against the defendant, if not otherwise prevented or excused from so doing. What weighs with me is, that the contingency having happened, I see no good reason why the plaintiff might not afterwards have proved for the amount of the stock notes, if still open to him; and if so, why he might not have applied to have the amount retained, pending the contingencies that still continued after the bond had been forfeited by reason of the defendant's default in relation to other contingencies that had happened. When the day was past the amount became payable in money, and the plaintiff was no longer bound to accept axes.

In *Yallop v. Ebers* (1 B. & A. 102), *Lord Tenterden, C. J.* said—By the statute 6 Geo. IV. ch. 16, a bankrupt may be discharged from all debts due at the time of issuing the com-

mission; all that are certain to become due at a future time, and all that may or may not become payable by the bankrupt at a future time, &c." *Taunton, J.*, "Sec. 56 applies only when the bankrupt becomes liable on a contingency; where, on the occurrence of particular circumstances, which are uncertain, responsibility attaches to him."—*Hoffham v. Foudrinier* (5 M. & S. 21).

The plaintiff might have proved against Shaw, before the stock-notes became payable, for the amount thereof; and if so, he might prove against the defendant after the days had passed and Shaw had failed to pay in axes or otherwise.

Shaw's bankruptcy before the defendant's, as alleged, is an additional reason why the plaintiff might have been allowed to claim, and the amount still to be paid be retained, as the probability of a default on Shaw's part at the days was thereby rendered very probable, if not quite certain. He had become incapable of paying, and the plaintiff's only remedy against him was by proving against his estate in bankruptcy. It does not appear that he did so; or if he did, that it availed him to any extent—The breaches on this demurrer stand admitted.

Exparte Shaw (1 Finl. N. R. 159).—A gave a bond to B. conditioned for payment of £1000 when C. an infant (if living), attained twenty-one, with interest in the meantime half-yearly. A. became bankrupt during the minority of C. and at the date of the *Fiat* there was an arrear of interest due on the bond. Held, that the bond was forfeited; that the debt was not contingent within the 12 & 13 Vic. ch. 106, sec. 177; and that B. was entitled to prove against the estate of A. for the whole £1000, with interest to the date of the *Fiat*.

If in the case before us the bond is not within the 9 Vic. ch. 30, sec. 32, as was held in effect in *The Skinners' Company v. Jones* and in the last mentioned case, it only seems to render it still stronger in favor of the defendant—*Dinsdale v. Eames* (2 B. & B. 8).

It may be said that every penal bond is a debt contracted, payable on a contingency; that is, contingent upon the event of the consideration being fulfilled or broken. But, looking

at the condition only as indicating the debt which the bond was given to secure, and regarding the penalty after forfeiture as still constituting only a security for the payments not yet due of what is specified in the condition, it is then a debt payable on the contingency of future additional defaults.

Every sum allowed as damages for breach of the condition under the statute of Wm. III. (except the penal one for detention of the debt) is deducted out of, and is virtually a part of the penalty; and so of each successive portion of the debt secured: and where the whole penalty or debt at law is exhausted, the debt is at an end.

When the matter or amount secured by the terms of the condition is undefined and too uncertain, it cannot be treated as a debt secured: but when the amount and time of payment are both specified and certain, it becomes, in connection with the forfeited penalty, a debt absolute; or, if not payable by the condition, a debt due under the penalty, though under the condition only payable on a contingency (whatever it may be), whether upon the happening of such contingency the obligor will forthwith become absolutely indebted in or liable to pay a sum or amount certain by the terms of the condition, the amount of which might therefore, by virtue of the forfeited penalty, be retained under the P. S. 9 Vic. ch. 30, sec. 82, to await the contingency. On the whole, therefore, though fully sensible of the doubts and difficulties surrounding the question, the best opinion I can form is, that it was a debt which the plaintiff might have applied to have had retained in the hands of the defendant's assignee until the contingencies happened, and for which he might then have proved under the 9 Vic. ch. 30, sec. 32; and that not having done so, the defendant is discharged, and the plaintiff's remedy against him barred at law: consequently that judgment should be against the demurrer.

McLEAN, J.—The points involved in this demurrer were argued on two occasions, during Michaelmas and Hilary term last, and a variety of cases were cited, which, from the different views presented in different cases, have tended to perplex and to make it very difficult to come to a clear and

satisfactory conclusion. I confess that I have had more than usual difficulty in this respect; and, after all, in agreeing as I do in the view taken by the Chief Justice, I am obliged to confess that there are many cogent arguments and a good many authorities which would justify the adoption of a different opinion.

The defendant, after some of the notes for which he became bound had become due, and while they remained unpaid, became a bankrupt in June 1848. The condition of the bond was broken, and the plaintiff could have sued for the penalty as for a debt before the plaintiff's bankruptcy. His remedy up to the time of the bankruptcy was only by an action of debt, in which it must have been alleged, as it is in this action, that by reason of the several promissory notes remaining unpaid an action had accrued to recover the penalty of the bond. The debt then to be recovered was the amount of the penalty, and not merely the amount of the several promissory notes, nonpayment of which had in law caused the forfeiture of the penalty. If a judgment had been recovered for the penalty, it would have rendered any action unnecessary for the recovery of the notes subsequently falling due; and all that would be necessary would be to revive that judgment by *Scire Facias*, and to proceed upon it to enforce the payment of the several sums as they might become payable from time to time. In this case the plaintiff is pursuing the precise course which he must have adopted if he had sued upon the bond when the notes became due prior to the defendant's bankruptcy,—he is proceeding for the penalty as constituting a debt by reason of a forfeiture arising from a breach of the condition; and the defendant in his plea alleges that such debt accrued due and was payable to the plaintiff before he, the defendant, became a bankrupt, and that the cause of action accrued at that time—that is, when the condition became forfeited. Is not that plea then founded in fact; and if it is, does the fact afford a sufficient answer to the plaintiff's declaration? It is in substance and nearly in words the same as the plea in the case of the Skinners' Company v. Jones (Bing. N. C. 484), on which issue was taken. In that case the facts admitted were in all respects the same as in this. There

quoted as an authority in favor of the plaintiff, was one of that kind; and there it was held that defendant was liable on his bond, though he had obtained a certificate as a bankrupt, because the claim could not be proved under the commission. The cases of *Lane v. Burghart* (8 M. & Gr. 597), and *Atwood v. Partridge* (4 Bing. 209), were decided on similar grounds; and the defendant was held liable in each case, notwithstanding his certificate as a bankrupt. The reason in all annuity cases is, that while the grantor of the annuity remains solvent and in a position to meet his own obligation, no valuation can be placed on the contingency of his continuing to pay (under the 56th section of the 6 Geo. IV. ch. 16); besides which it is obvious that where no default has arisen previous to the bankruptcy of the surety no debt will have been contracted, inasmuch as a bond in such case must only be regarded as an obligation to pay in default of some other person paying, and no debt will be subsisting at the time of the issuing of the fiat of bankruptcy.—*Thompson v. Thompson* (2 Bing. N. C. 168.)

The case in 4th Exchr. 530, *In re Willis* a bankrupt, seems to me to support strongly the view which I have taken. It establishes that under the 6 Geo. IV. ch. 16, sec. 56, a claim on a guarantee for a sum certain when due, is proveable as a debt, and before it is due is proveable as a debt due on a contingency. I have already intimated that I look upon the plaintiff's claim in this case as for a sum certain, and after the default of Shaw, I have no doubt that what was past due could have been proved as a debt, and that the balance could have been proved as a debt payable upon a contingency, for the amount of which an application might be made under the 32nd section of our statute 9th Vic. ch. 30, with a view to have it retained in the hands of the assignee until the arrival of such contingency.

Under all the circumstances, and upon the best consideration which I have been able to give to the subject and the cases bearing on it, I have, though not without some hesitation, come to the conclusion that the defendant's certificate as a bankrupt since the cause of action sued on accrued to the plaintiff is a bar to the action, and that judgment must therefore be given for the defendant upon this demurrer.

RICHARDS, J.—The question to be decided is, could the demand, which is the subject matter of this action, or any part of it, have been proven against the defendant under the commission of bankruptcy issued against him; if so, then, as far as the demand was so provable, defendant is discharged from further liability under the provisions of the bankruptcy laws.

It is contended on behalf of the defendant that default having been made in the payment of some of the notes before his bankruptcy the bond became forfeited and the penalty became a debt, for which the plaintiff might have proven, and by virtue thereof have ranked for all the notes which were unpaid, whether then due or not; or at all events, he could have come in under the provincial statute 9 Vic. cap. 30, sec. 82—his claim at that time being a debt against the defendant payable on a contingency.

The 32nd section of our provincial statute above referred to is nearly similar in its provisions to the Imperial statute 6 Geo. IV. cap. 16, sec. 56. I shall abstract the section, and shew how it varies from the clause in the Imperial act.

Section 32 of the Provincial act 9 Vic. ch. 30, enacts,

“That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioner

(Prov. statute 9 Vic. ch. 30, sec. 32.)
 ‘to order the assignee to retain the same in his hands until the arrival of such contingency, or until it shall be ascertained that it cannot arrive; and

(Impe'l stat. 6 Geo. IV. ch. 16 sec. 56.)
 ‘to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be ascertained before the contingency shall have happened, then

such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; pro-

vided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed,

(*Prov'l Stat. 9 Vic. ch. 30, sec. 32.*)

'and if it shall be ascertained that such contingency cannot arrive, the sum shall be applied to the general benefit of the creditors in the same manner as other assets of the bankrupt's estate.'

There is no doubt that the demand could have been proven against the defendant, if he had been a principal in the transaction; and the peculiar manner in which the sureties undertake that if Shaw does not pay the notes on the respective days on which they fall due, they, the sureties, "will well and truly, absolutely and at all events, pay each and every of the said notes on the respective *days on which they shall become due* and payable, according to their effect," affords further room for argument that on the forfeiture the penalty became a debt, and that the undertaking was one which created an obligation to pay on the part of the obligors in the bond, as principals; and the case of the *Skinner's Company v. Jones* (3 Bing. N. C. 481) may be urged as an authority in favor of that proposition. But in that case the bond was signed by the principal, Butler, and the defendant his surety, and they became jointly and severally bound to the plaintiffs, and then the condition was if Butler paid as therein mentioned the bond should be void, otherwise to be in full force and virtue. Butler did not pay, and default having been made in some of the payments of interest, only at the time they became due under the bond, although paid afterwards, the court held the bond being forfeited before the bankruptcy, the amount could have been proved under the commission; but they did not consider it came under the 56th section of the Imperial statute, but viewed it as if each of the parties had given a separate bond to the plaintiffs for the penal sum, with a condition that it should be void on Butler paying as therein provided; thus clearly viewing the undertaking of the defendant there as a principal. In this case the con-

dition is different; the obligors are here clearly only sureties. The condition or undertaking is that if Shaw shall *not* well and truly pay the notes on the respective days &c., then, if the sureties shall well and truly and at all events pay, the bond to be void, otherwise &c. It seems to me therefore that the defendant was and must be considered as a surety only, and not in law as a principal, contracting a *debt*; and that in such cases the penalty is never, in a court of bankruptcy, considered as a *debt* against a surety to warrant a proof against his estate.

In *Exparte Marks* (3 Mont and Ayr. 532), Erskine, C. J., says in effect, "although the Chancellor took advantage of a *legal debt* for the purpose of working out an equitable adjustment of the real claim of the creditor against the insolvent estate of the principal debtor for its full value, yet *this was never done against a surety*; and he adds, "there is no instance to be found of the grantee having ever been admitted to prove the value of an annuity against the estate of a bankrupt surety, *even upon a bond forfeited*, nor can I discover any equitable principle upon which such a proof could be allowed."

In *Thompson v. Thompson* (2 Scott, 266, S. C. 2 Bing. N. C. 168), confirming the case of *Exparte Thompson*, in *Re Wyatt and Hy. Thompson* (M. & B. 219), Tindal, C. J., says, "The question is reduced to the single point, whether the instalments of an annuity, for the payment of which the bankrupt is surety *only*, and which he expressly covenants to pay in case of the default of the grantor, are proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety; and we are of opinion they are not." This case may be referred to as applicable to the question of whether a party undertaking to pay on the default of another contracts a *debt*, within the meaning of the clause of the statute under discussion. The doctrine laid down in these cases is confirmed in the recent case of *Arnott v. Holden* (17 Jurist 321, S. C. 16 Eng. Rep. 142), decided in the court of Queen's Bench in England. In that case plaintiff set out a joint and several bond of defendant, which recited that John Mather had agreed with plaintiff

for the sale of an annuity of £20, to be paid to the plaintiff during the joint and several lives of himself and wife, and during the life of the survivor for £150, and that Mather had requested defendant to join in and execute the bond (which defendant had consented to do) for securing the payment of the annuity, and that Mather had received the £150. The condition was for the payment by *Mather or defendant* of the annuity by two equal half-yearly payments on the 9th of December and the 9th of June in each year. The breach suggested was non-payment of two-and-a-half years' annuity. Defendant became bankrupt in 1836. The annuity was paid by Mather half-yearly down to 1848, *but never on the days specified in the condition, so that there had been breaches before defendant's bankruptcy.* Held, (Wightman, J., dissenting), that *defendant executed the bond as surety*, and that *plaintiff could not*, on the bankruptcy of defendant, have proved for the value of the annuity or the penalty of the bond. *Erle, J.*, in giving his judgment in the case, observes, "Whatever might be the effect of the present form of bond in respect of *pleading*:—in *bankruptcy*, where the *true substance is ascertained* without pleading, the present case creates the same liability as the form in Thompson's case. If the grantor pays, the surety is free; if he makes default, the surety is liable."

It seems to me clearly to be deduced from the authorities on the subject that in England the plaintiff would not have been permitted to prove against the defendant's estate for anything more than such of the notes as became due previous to the bankruptcy, and he could only prove as to the notes due since that, if at all, under the clause of the statute above quoted, as a *debt payable on a contingency*. If the conclusions I have thus far arrived at be correct, then I think we should consider the case with a view to the proof as a *debt payable on a contingency*, in the same manner as if the bond had not been forfeited, or as if there had been a separate bond for each note, similar in all respects as to condition, recitals, &c., to the one set out in the declaration. Then comes the question, did the defendant, when he signed the bond, *contract a debt* with the plaintiff payable on a contingency, within the meaning of the bankrupt laws as they

are administered, or *merely a contingent liability, which might ripen into a debt?*

In *Exparte Marshall*, in the matter of Fox, Nov. 30, 1838, M. & A., Mr. Commissioner Merrivale, at page 122, states, "that in order to establish a proof under the 56th section (of 6 Geo. IV. ch. 16) there must be a *debt* contracted and actually existing at the time of the bankruptcy." He repeats the same language at page 12. At page 127 he further remarks, "It seems that this question of debts payable on a contingency has been sometimes argued on the ground that it was the professed design of the legislature to exonerate the bankrupt's estate from every species of future liability, by proving for its discharge under the commission, and the 56th section has accordingly been represented as introduced to meet every case of that description, untouched by the 4th or 5th preceding clauses; that is, the 51st, relating to debts payable at a future time, and on an event certain, the 52nd, relating to sureties, the 53rd relating to bottomry and *respondentia* bonds, &c., and the 54th and 55th, to creditors by way of annuity and their sureties; but I am of opinion that it is impossible to collect any such meaning either from the language of the act itself or from the nature of the evil, which had been previously pointed out by those most conversant with the principles and practice of the bankrupt laws as calling for a remedy. That evil consisted in the hardship on many meritorious individuals having an interest in the bankrupt's estate to an amount certain, although dependant on an event in its nature uncertain,—as, for instance, that of survivorship—in being absolutely precluded from sharing with other creditors by the circumstance of the event not being determined at the time of the bankruptcy. And the particular class of creditors who were more especially marked as objects of the proposed remedy was that which has been always regarded as entitled to peculiar protection—viz., married women, infants, and other persons having an interest under wills or by marriage articles, whose situation was often rendered most deplorable by accidents against which no human foresight could have provided. This, as appears from the language of all the books on the subject of the bankrupt

laws, was the object which the legislature had most immediately in view in the introduction of the clause in question. It never was the design that the clause should be extended by a fancied liberality of construction to a variety of cases not within its literal scope and meaning; and the very preciseness of its words and phrases expressly negatives such an inference. It is further negated by the consideration of the far greater evils which would ensue from the admission of the required construction, and its extension to cases of remote and indefinite liabilities. Mr. Commissioner Fonblanque argues to the same effect; and, considering that the authorities established that the uncertainty of the amount of a demand is a sufficient objection to proof, adds at page 132, *a fortiori* must it be an objection that it is uncertain whether any debt whatever will be demandable. * * * But it is said, the event having happened, a value can now be ascertained—that is to say, a debt not proveable on Monday, for which the bankrupt was then liable notwithstanding his certificate, shall by a subsequent act of other persons become proveable on Friday. This is contrary to the whole principle of the bankrupt law, which fixes the relative liabilities of the estate and bankrupt by the date of the commission or act of bankruptcy. How long are we to wait for the happening of these contingencies? It is not, says Mr. Justice Bailey, the intention of the legislature to lock up the property of the bankrupt upon the possibility that at some period or other some person may have a claim on it. Are we to wait six years or twenty, or till the expiration of a lease, when the bankrupt may be contingently liable for covenants?

Bankruptcy is a summary remedy—a *festinum remedium*. Are we to await the expiration of the time appointed by the Statute of Limitations, before we proceed to that speedy distribution which it is the declared intention of the legislature to effect? It is said, however, that it was also the intention of the legislature in the new statute to give the bankrupt a complete discharge from all liabilities. If so, the legislature has been unfortunate in the expression of its will, for by using the single word “liabilities,” which it has not used, it would

have attained its purpose and might have dispensed with the greater portion of six long sections.

Mr. Commissioner Holroyd, in arguing on the case before him, at page 136-7, says—"A party taking a security of this sort does not give credit for a sum of money to the person who enters into such security. In *Hoffham v. Foudrinier* (5 M. & S. 21,) Lord Ellenborough says,—
"The taking a collateral security is not giving credit for a sum of money to the person who enters into such security."
The relation of debtor and creditor is not thereby raised between the parties. To constitute a debt, the substance of the contract must, I think, be to pay a certain sum of money. By the words of the 56th section it is the payment alone of the debt that is put in contingency, not the contracting of the debt; and, putting this construction on the words of the section, the amount of the debt payable upon the contingency would be certain, though if the contingency had not happened the *then* value of the debt would be uncertain, according to time, of the probability or improbability of the happening of the circumstances upon which the payment of such debt was made to depend. The inconvenience and injustice to which a contrary construction would lead is great, and where is the line to be drawn? Suppose the case of a bond executed by the bankrupt in a large penalty conditioned to guarantee the performance of covenants in a lease, a farming, mining, or building lease; a future possible demand may arise on this bond during some period or after the expiration of the lease, which may be of any possible duration. Suppose a claim to be entered on such a bond for £5000, and the proofs amount to £500, the assets being sufficient to pay on the proofs and claim two shillings in the pound. Thus £500 would be locked up (sufficient to pay on the debts proved twenty shillings in the pound), because it was possible at some future period the whole or part of it might be claimed. A bond for the performance of covenants to do a collateral thing may never be forfeited, it may lie *in perpetuam*, and so the assets would never be administered; whereas the policy of the bankrupt law is to divide assets speedily, not to lock them up to meet future possible demands.

Again: If such a debt be proveable, it would also be discharged by the bankrupt obtaining his certificate, which he might do before any actual breach of the condition of the bond; the breach of the condition might not happen until two, three or more years afterwards; the obligor might then be in good circumstances and able to pay; but no, the certificate would then be a bar to any such claim.

At page 156, Erskine, C. J., says, "In my judgment (February 20, 1834) in *Exparte Myers*, I have not sufficiently marked the distinction between *contingent liabilities* that may never become *debts*, and *contingent debts* that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class upon which no debt has arisen till after the bankruptcy, cannot be proved under the 50th section."

Exparte Myers. In re *Myers*, in note as reported in 12 Jurist 448. (May 31, 1848.) Commissioner Shepherd says, "I think in almost every case it is laid down that a debt must be an existing debt before the bankruptcy, though payable on a contingency. I think I am bound by the last case that a debt not existing at the time of the fact, though payable on a contingency, cannot be proved."

Mr. Commissioner Fane, gives an elaborate judgment: reviewing the authorities and acting on the words of the statute, concludes that a debt payable on a contingency is a contingent liability in terms. If there is a debt, there is no contingency; if there is a contingency, there is no debt: and concludes by differing in opinion from the other two commissioners.

Mr. Commissioner Evans says, "The deed is in effect a mere deed of indemnity. At the time of the bankruptcy no debt was due by the bankrupt; and after a review of the authorities, he arrives at the conclusion that the deed cannot be proved. ALFRED SMITH, Vice-Chancellor, in the case being referred to him, reviews the authorities against the proof, and in substance only confirmed the decision of a majority of the commissioners.

In the *Joint Report of 14 Jurist*, page 516, it was determined that claims of an obligor surviving after the bankruptcy could not be proved against the estate of a surety under

⁶ Geo. IV. ch. 16, sec. 56; that it was not a debt payable on a contingency.—See *Exparte Simpson* (1 M. & A., 541, S. C. 3 D. & C. 792); *Dutchman v. Tooth*, (5 Bing. N. C. 578), *Exparte Lancaster Canal Co.* (Mont. & Bl. 94). In *Exparte Marks et al.* (3 M. & A.) the Chief Judge says, “I have no hesitation in declaring my opinion, that where it is the manifest intention of the parties upon the face of the contract that the bankrupt should only be responsible as surety upon the default of the grantor, that the grantee ought not to be permitted to prove the value of the annuity against the surety, although there may be in the deed a covenant for its payment.”

In *Chapman v. Davis* (3 M. & G. 608) Tindal, C. J., says, “At the date of the fiat the defendant was liable indeed to indemnify the plaintiffs from the consequences of Bacon’s failure to pay the instalments; but there was no debt due from the defendant payable in future, either absolutely or upon a contingency; there was merely a liability which might or might not terminate in a debt, and which was therefore altogether incapable of being the subject of any valuation by the commissioners. There was nothing consequently proveable either under the fifty-first or fifty-sixth sections of the Bankrupt Act.

In *Hinton v. Acraman* (2 C. B. 410), Tindal, C. J., in delivering the judgment of the court, says, in construing this (the 56th) section, a distinction has been taken (in the case *Exparte Marshall*, cited and relied upon by Erskine, J., in *Abbott v. Hicks*, 5 N. C. 578) between contingent liabilities which may never become debts and debts payable on a contingency; and it has been held that the latter only are proveable under the commission. The present case, although in form a case of debt on bond, yet the bond being defeasible on performance of the condition, it is in substance not the case of a contingent debt, but a contingent liability. At the time when the fiat issued it was quite uncertain whether any debt would ever arise upon the bond—it was at the time a liability which would not become a debt unless the condition were broken.

The fact that in England by the last Bankrupt Act (12 & 13 Vic. ch. 106, sec. 177,) express provision is made for

proving a liability to pay money on a contingency, seems conclusive as to the correctness of the foregoing decisions.

I think the authorities quoted shew that in England, under the 56th section of the statute 6 Geo. IV. the claim in question could not have been proven under the defendant's commission, if the bond he had signed was to secure an annuity of the amount per annum of the notes secured under the bond in question, although a forfeiture had taken place previous to the bankruptcy; and that the signing of the bond was not contracting a debt payable on a contingency. Now what difference is there between the bond in this case and that of an annuity bond, that they should be differently treated before a court of bankruptcy? I can see that the surety for the annuity has the advantage of an additional contingency, which this defendant has not. The annuitant may die before the day of payment, and he may not then be called on to pay—but that is a contingency, the value of which can be easily ascertained; and courts had no difficulty in fixing that value in cases of the forfeiture of the bond by the principal or his bankruptcy value: as soon as the value of that contingency is ascertained and put at a particular sum, then the remaining contingency is equal in both cases; the grantor of the annuity may or may not pay,—the grantee of it may or may not look to the surety. The maker of the notes may or may not pay—the holder may or may not look to the surety. If the grantee looks to the estate of the surety on the failure of the grantor to pay it, the value of it is an ascertained amount; if the payee of the notes looks to the surety, their amount is fixed. On that point I shall have occasion to say something more presently.

I do not find any clause, either in our own or the English Bankrupt acts, which would authorise the plaintiff to prove against the defendant's estate, except the 56th section of the English and corresponding section of our own act. Without the forfeiture of the bond, it cannot be said that the defendant, by signing it, contracted a debt payable on a contingency; he only contracted a contingent liability. According to the best opinion I can form, the default of the maker in paying some of the notes before the bankruptcy would not enable the plaintiff to seize the penalty

of the bond and make it *contracting a debt*, so that the assignees would be obliged to retain the same until the arrival of the contingency. What, are they to retain the penalty of the bond or the amount of the notes then unpaid? If it be the *penalty*, then when the contingency arrives he may prove in respect of such *debt*. According to the literal meaning of the clause, it all has reference to the *debt* or sum certain contracted by the bankrupt, payable on a contingency. Suppose the claim of the plaintiff to be filed under the Provincial statutes against defendant's estate for the amount of the notes—if they can be considered the debt before they became due, what means have the assignees of reimbursing the estate of the surety?

Chief Justice *Tindal* says, in *Thompson v. Thompson*, before referred to—"If the whole annuity is allowed to be proved against the estate of the surety, there is no provision in the statute for reimbursing the estate by enabling the assignees to look to the principal debtor for indemnity; whereas in the case of the bankruptcy of the grantor of the annuity, and the annuity being valued and proved against his estate, a provision is made for the indemnity of the surety by the fifty-fifth section—namely, that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity creditor against the bankrupt's estate. By this course, the whole of the annuity transaction is closed as to all parties—the grantor, the surety, and the annuitant. The absence therefore of any similar provision in the case of the surety becoming bankrupt leads to the inference that it was not intended to provide for such case by the statute, but that it should be left as it was at common law." The same reasoning will apply in this case. By section thirty of provincial statute 9 Vic. ch. 30, as well as in the Imperial act, provision is made that sureties may prove after having paid the debt, although after commission issued, and if the creditor has proved, shall be allowed to stand in his place, or if not, he may prove himself, not disturbing former dividends. No provision is made in cases like the present, when the surety becomes bankrupt, any more than in the case of a surety in an annuity bond.

Is the undertaking of the defendant by his bond, or the condition of it to pay a "certain sum of money," using the words of Mr. Commissioner Holroyd before quoted, or is it an undertaking as to part of the claim that the maker of the stock notes will perform an executory contract in relation to the delivery of a certain quantity of axes to the plaintiff?

These notes, if they can properly be so called, are not set out in the bond or condition, but from what appears therein, I have endeavoured to frame a document which shall be in effect the same as that referred to.

Toronto, 14th April, 1846.

£42 8s.

One year after date, for value [forty-two pounds eight shillings] received, I promise to pay William Ledley Perrin forty-two pounds eight shillings, [payable] in good merchantable axes at the market price, but not to exceed the rate of three pounds fifteen shillings per box, payable at the establishment of Messrs. W. L. Perrin & Co., Toronto.

It is probable the words between brackets are not in the original, but I think they may be imported into it without changing its legal effect or meaning.

I think we must presume as between the original parties this document was legal and capable of being enforced, having a legal and valid consideration at its date; in this action I do not suppose this could be disputed. Now, what is its legal effect? Is it not that the signer of it, for a valuable consideration, promises to [pay] deliver one year after the date, to the plaintiff, at the establishment of Messrs. W. L. Perrin & Co., at Toronto, axes to the value of £42 8s. at the rate of £3 15s. per box, or at whatever price less than that may be the market price of axes at the time for their delivery? If delivered on that day, was not the plaintiff bound to accept axes, and had he not the right to demand the axes at a price not exceeding £3 15s. per box. Suppose on that day axes were worth £5 per box, could he not, in an action against the signer of the note, recover damages for the difference in price at what they then were and what he had agreed to pay for them. I think he could. If that is the case, then this bond is not solely for the payment of a sum certain on a contingency, but

partly an undertaking that the signer of that paper will perform an executory contract.

Again: How could this document be declared upon, unless as an agreement for the delivery of the axes; it certainly is not a promissory note, if it was set out in the declaration, could it be referred to the master to say what was due on it? I think not; it would surely require the intervention of a jury. In *Green v. Bicknell* (8 Ad. & El. 715) Lord Denman says—"We were strongly pressed with these authorities as establishing the principle that any right to recover money or money's worth may be treated as a debt when its amount can be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is generally speaking, that no claim of this nature shall be proveable as a debt for which the intervention of a jury is necessary."—The case then discussed was whether the plaintiff could prove for the difference between the contract price of a quantity of oil which the bankrupt had refused to accept and the market price of the oil at the time of the refusal.

The case *Re Willis* (4 Exchequer 530), was decided principally on the authority of *Exparte Myers* (M. & B. 229), in which the decision was afterwards put by the judges making it on quite a different ground from that at first presented; it finally appearing that Myers was a principal in the transaction, and that his undertaking had become absolute before his bankruptcy, and was at the time of the bankruptcy an existing liability according to the nature of the undertaking itself. But the agreement of the bankrupt in *Re Willis* was in the nature of a *del credere* commission, with which the principals had nothing to do; it was a primary undertaking on his part, entered into directly with the claimant without any privity with the original debtor; and he cannot be viewed in the same light as a mere surety who, in privity with his principal and for his accommodation, undertakes to pay if he does not. It is true that under a *del credere* the undertaking is to pay if the principal debtor does not, but there is no privity between them; and if the broker does pay, he cannot set it off in an action by the assignees of the insolvent principal for other claims which existed between the parties—4 M. & S. 566.

My learned brothers and myself have had frequent discussions on the questions arising in this case; it has been argued twice; and the difference of opinion that exists between us does not result from any want of consideration or a desire to arrive at a united judgment. The points raised are nice and difficult—much of the difficulty arises from the conflicting decisions on the subject, and the different principles upon which the courts of bankruptcy and the courts of common law usually decide questions in relation to bonds, the former courts viewing the condition of the bond as the substance of the agreement, and the sum payable thereby as the debt, whilst the latter view the penalty as the debt. Many of the expressions of the judges would undoubtedly lead to the conclusion arrived at by a majority of the court, that the penalty of the bond on default of payment of any sum, however small, for a period however short, becomes a debt for which the obligee may rank upon the estate of a bankrupt surety.

I think, viewing the condition as an agreement, and enforcing it in the same manner as an agreement, when the bankrupt is a surety, is more consonant with the views of a court of equity and of the court of bankruptcy. I think the latest authorities sustain this view, and that *Arnott v. Holden*, before quoted, decided in 1853, is an express authority that the forfeiture of the bond before the bankruptcy of the surety does not make the penalty a debt so as to authorize the obligee to prove on his estate.

I therefore think judgment on the demurrer should be for the plaintiff.

Per Cur.—Judgment against the demurrer.

ROSS ET AL. V. FAREWELL ET AL.

Bail—Statute for relief of.

Under the fifth section of the 18th Vic. ch. 69 defendants in action on bail bonds, where the breach has arisen by the separation of counties by the legislature, are entitled to have all proceedings stayed upon payment of the plaintiff's costs as between attorney and client.

Held, also, that the word "proceedings" in the proviso to the fifth section embraces proceedings both before and after judgment.

This is a rule on plaintiffs to shew cause why they should not deliver to defendants their bill of costs as between attorney and client, and why it should not be taxed, &c., and why on payment of such costs as taxed all further proceedings in the said action should not be stayed, and the said action be discontinued, with the stay of proceedings in the meantime upon the execution in the sheriff's hands,—upon reading the affidavits filed, &c. On the 18th May, 1855., defendants demanded a bill of plaintiffs' costs. On the 21st May, 1855, summons of *Draper, J.* for a bill—discharged. On the 25th of May, a second summons of *Macaulay, C. J., C. P.* On the 28th of May, a third summons of *Richards, J.*

Judgment was entered up in February last,—execution issued; seizure upon defendants' goods,—made,—not sold. Steps for appeal were in progress when the statute 18 Vic. ch. 69 was passed, under which this application made. As to the proceedings before judgment,—see ante p. 29.

McPHERSON V. FAREWELL ET AL.

AND

MCDONALD V. FAREWELL ET AL.

Similar application, except that it is before judgment, and is to discontinue the action.

The facts undisputed are, that the defendants became bail to the limits for Prosper Armstrong Hurd, arrested upon a *Ca. Sa.* when the county of Ontario formed one of the United Counties of York, Ontario and Peel. That at the time the County of Ontario was separated into an independent county Hurd resided therein, but the gaol of the United Counties was situate in the city of Toronto in the County of

York. After the separation, Hurd continued to reside in the county of Ontario, but visited Toronto in the county of York, and returned to Ontario. Plaintiffs prosecuted defendants, his bail, on the ground that the limits were curtailed to the United Counties of York and Peel, and Hurd's residence in or return to Ontario was a departure; and the plaintiffs in the first suit obtained judgment and execution.

MACAULAY, C. J.—In the two last mentioned cases rules were obtained, calling on the plaintiffs to shew cause why a nonsuit should not be entered on leave reserved at *Nisi Prius*, and should be properly disposed of in the first place. The facts are similar in effect to those proved upon the trial of the first-mentioned case of *Ross et al. v. Farewell and Hurd*, and if governed by that case the rules should be discharged, —that, however, depends upon the consideration whether the late act is a declaratory law, and therefore retrospective or introductory only of a new state of law, and in the latter event whether it governs these cases which were pending before and when it was passed, or whether they are to be decided by the law as it stood according to the first above-mentioned case when these actions were brought. The act is the 18 Vic. ch. 69, intituled an act, &c., passed the 3rd April, 1855,—See it, especially section five, with the proviso at the end.

According to *Hitchcock v. Way* (6 A. & E. 943), when the law is attended by statute pending an action, the law as it existed when the action was commenced must decide the rights of parties, unless the legislature by the language used shew a clear intention to vary the mutual relation of parties. —*Warner v. Beresford* (2 M. & W. 848); *Morgan v. Thorne* (7 M. & W. 400.)

In *Simpson v. Ready* (11 M. & W. 346) *Parke B.*, “When an act of parliament is repealed, the law is as if it had never passed; but here the first section of the 5th & 6th Vic. ch. 104, merely alters the law as laid down in *Reg. v. York* (2 G. & D. 105), with respect to proceedings commenced after the passing of that act. This is evident from the subsequent

clauses, which enable a defendant to obtain a stay of proceedings upon payment of the costs out of pocket"—Doe Johnson v. Leveridge (11 M. & W. 517).

Aided by the proviso with which the fifth section of 18 Vic. ch. 69 concludes, I think the sounder construction is, that the act was not intended; and does not apply, to suits pending when it was passed.

I do not consider the fifth section either declaratory or retrospective, so far as relates to existing suits, and therefore think the present rules should be discharged. To make them absolute would be to throw costs upon the plaintiffs, whereas the act evidently intended that they should be indemnified in their own costs.

Then, as to the other rules in these two cases: It was contended the defendants should plead the statute in the nature of a plea *puis darrein continuance*, and place the defence on the record, to enable the plaintiffs to appeal the question. —Lane v. Ridley (10 Q. B. 481).

But it appears to me the defendants are entitled to pay the costs as between attorney and client, upon which payment the proceedings shall be discontinued, and that in making these rules absolute we are only facilitating the relief to which the defendants are by law entitled; they should therefore be made absolute.

Then as to the first case: The first special objection is, that the act does not extend to relieve the defendants after judgment and execution, especially after a levy, on the ground that the execution is entire, and being once begun is considered executed, and may be continued.

The second and general objection, applicable to all the cases, is, that the fifth section is inoperative, introduced as it is in a special act, which in its title contains no reference to such a measure; and that, appearing where it does, it can at best be regarded as a private or purely local provision, not susceptible of extension beyond the counties of Halton and Wentworth.

The first objection is mainly rested on the force of the words "proceedings in law" in the proviso to the fifth section, as to which it is contended they do not apply to judgments

or proceedings after judgment, as evinced by other portions of the same statute which distinguish between proceedings and judgments.

The first part of the proviso states "that in any case where proceedings in law have been instituted before this passing of the act, &c." Now it appears to me that so far the words may well relate to the case in question, for it is a case where, in fact, proceedings in law had been instituted before the passing of the act. But still, it is said the words "case" and "proceedings" should be restricted to suits then pending; a construction supported by what follows in the proviso—namely, that "such legal proceedings" may be continued and prosecuted until the payment of costs, &c.—whereupon the said proceedings shall be discontinued. The words, "such proceedings" and "said proceedings" relate back to the first part of the proviso—namely, to any case where proceedings in law had been instituted before the passing of the act.

When the beginning of the fifth section is looked to, it will be seen that the object of the legislature is to prevent injustice to parties in any case; and, as there may be proceedings in law both before and after judgment in the same case, I think we only give effect to the obvious intention of the legislature by making the rule absolute.

Proceedings are no longer pending in the action or suit before judgment,—*transit in rem judicatum*; but proceedings after judgment are pending on both sides,—on the plaintiff's part, to enforce a levy of the amount of the judgment by execution, and on the defendant's part, to appeal from the judgment on payment of all costs; the act declares that the said proceedings shall be discontinued, whatever the word "said" means.

Whether the effect of such payment will be to put an end to the judgment, it is not necessary now to decide. The statute says that in any case—in other words, in every case where proceedings at law had been instituted before that act—the said proceedings should be discontinued; and then I am disposed to think that the statute itself discontinues all the proceedings *ab initio* when the costs are paid. At any rate,

that the court should be aiding, if called upon, as it is, to stop further proceedings, although as a general or technical rule a judgment cannot be discontinued, nor an execution once begun be suspended. A *procedendo* may issue in order to remit a judgment improperly removed from, back to the proper tribunal to enforce it by execution—Rex v. Neville 2 B. & A. 299; Rex v. Hall 1 B. & C. 136; Searson v. Small, one, &c., 5 U. C. Q. B. R. 259; Lander v. Gordon 7 M. & W. 218; Dunford v. Trattles, 12 M. & W. 535; Syde v. Bormand, 1 M. & W. 113; 12 Vic. ch. 10 sec. 5 No. 5; Tidd's Prac. 455—speaks of proceedings being stayed by writ of error, which is after judgment.

No doubt the term proceedings is usually applied to the steps taken in the progress of a suit to judgment, but it does not follow that it cannot have a more extended application to fulfil the plain intent of an act of parliament; and, looking to the remedial objects and intentions of the legislature, I think we may, and therefore ought to hold that proceedings after as well as before judgment were meant to be embraced, and that it is not too late for a defendant to avail himself of the relief afforded at any time before the debt recovered is paid or realized under an execution.

As to the clause being void under the fifty-ninth section of the Imperial statute 3 & 4 Vic. ch. 35, I think the third section of that act sufficiently answers the objection, and shews that it has force of law in Upper Canada, although the directions of the fifty-ninth section may not have been strictly observed, a fact however of which we have no regular notice, the royal instructions not being before us. So as to its being a private, and not a public act; the other sections are what I understand by a public local act, and as to the fifth section, it is *pro tanto* a public act. But that can make no difference on this application, as it is brought before us in a collateral proceeding, not by special pleading, and it is proved by the Official Gazette, in which it is published.

If the two last objections, or either of them, be deemed tenable, the plaintiffs must appeal. Indeed, I suppose all these rules and the decisions thereon may be suggested on entering the rolls, and that the plaintiffs may appeal from the decisions thereon.

As at present advised, I think the three rules to refer the costs for taxation should be made absolute, and the two for entering nonsuits may be discharged; to adopt the other alternative would, it appears to me, frustrate instead of furthering the objects of the legislature, according to the true intent, meaning and spirit of the fifth section of the act.

The Imperial statutes 3 & 4 Vic. ch. 5, and 5 & 6 Vic. ch. 104 sec. 6, resemble the fifth section of the one now in question, but are not in terms quite similar. * The first prohibits the recovery back of monies paid or made under judgments, as if judgments might be restrained in their execution if not executed, though it does not say so in express terms. The last expressly excepts judgments from its operation, both implying that judgments might be construed to be included.

The reasons for proceeding upon writs of *Fi Fa.* after a levy made, notwithstanding the allowance of a writ of error, do not govern, because then the execution might require to be renewed; and when executed, the money is paid, not to the party, but into court, to abide the result. Here the proceedings are by statute to be absolutely and finally discontinued. *Thurston v. Mills* (16 East. 254), and *Giles v. Grovir* (9 Bing 128), are cases of writs of *Fi. Fa.* superseded after levy by writs of extent at the suit of the Crown.

McLEAN, J.—In Hilary Term last, or rather at the sittings immediately after that term, a judgment was given in this court by which the defendants were declared liable in an action brought against them on a recognizance of bail for the limits in behalf of one Prosper A. Hurd, to the jail of the United Counties of York, Ontario and Peel. A verdict had been rendered for the plaintiff, subject to the opinion of the court on the question whether Hurd had broken the condition of the recognizance by passing to and fro between the counties of York and Ontario, still remaining within the limits of the jail of the United Counties of York, Ontario and Peel, as they were at the time the recognizance was entered into. The court was obliged to decide, notwithstanding the apparent hardship to the bail, that the limits of the jail, though curtailed by the erection of the county

of Ontario into a separate county, were those to which Hurd was bound to confine himself under the terms of the recognizance, and that the defendants were therefore liable for a breach of its condition, however unintentionably by Hurd. During the recent session of Parliament an act was passed (ch. 69), entitled, "An act for making certain provisions, rendered necessary by the separation of the counties of Halton & Wentworth," in which some provisions are contained, not applying exclusively to these counties, but in fact extending to all similar cases, and embracing all the difficulties arising from the course of legislation in the separation of the county of Ontario from the united counties of York and Peel. The fifth section enacts that in any case where a person shall have been heretofore or shall hereafter be admitted to the limits of any union of counties in the manner prescribed by law, and when such union shall have been heretofore or shall hereafter be dissolved, or where any one or more counties shall have been heretofore or shall hereafter be separated from such union, after such admission, then and in every such case the said person shall be held to retain the right to travel and reside in any portion of the said counties, as if no dissolution or separation had taken place; and the said person *shall not be held*, by reason of such travel or residence, to have broken any bond or condition thereof, or to have forfeited any security given for the purpose of obtaining the benefit of such limits: provided always, that in any case where *proceedings in law have been instituted before* the passing of this act, against any person, or his or her sureties, by reason of such person having travelled from one county into another county of the said union, or by reason of his or her having continued to reside in one county of the said union after such dissolution or separation, *such legal proceedings may be continued and prosecuted* until the payment by the defendant or defendants of the plaintiff's costs of suit as between attorney and client; and on such payment the said proceedings shall be discontinued. The object of passing that clause is declared to be to prevent injustice to parties; and it is obvious that it was intended by the Legislature to give relief in cases similar to the present, where the position of the plaintiffs has not been

rendered in any respect worse by any acts of their debtors in moving to and fro within the limits to which they were originally bound to confine themselves, but where, by a legislative act, such limits have been curtailed by the establishment of new counties, without any provision as to the limits to be thereafter observed, and parties have been rendered liable as for a breach of their recognizances, though the debtors may have scrupulously confined themselves to the limits formerly assigned. The clause is retrospective in its operation, and provides that from the time of its passing no person shall, by reason of having travelled from one county to another within the union, or having resided in any one of them, be held to have broken any bond or condition thereof, or to have forfeited any security given for the purpose of obtaining the benefit of such limits. Then as to cases like the present, in which proceedings in law have been instituted, it provides that such proceedings may be continued and prosecuted until the plaintiff's costs are paid by the defendants, and that on such payment they shall be discontinued. This part of the clause, as it appears to me, applies to all cases in which proceedings in law have been instituted, without reference to the stage in which such proceedings may be. If any judgment has been obtained, but the money has not yet been collected, and the execution remains unsatisfied, I take it that on payment of the plaintiff's costs as between attorney and client, no further proceeding can take place with a view to enforce the payment of the amount of the execution. The meaning which must be attached to the statute is, that all proceedings whatever shall cease as soon as the costs are paid, but that they may be continued until they are paid. The act itself must operate as a discontinuance on the payment of the costs, without any interference of the courts or parties, inasmuch as it directs that the proceedings shall be discontinued. If a plaintiff were, notwithstanding, to proceed, the court, on application, would no doubt restrain such proceeding; but it is only in such a case, as it appears to me, that the interference of a court would be necessary.

RICHARDS, J.—I concur in opinion with my brothers, that

the fifth section of the statute 18 Vic. ch. 69, applies in this case. The arguments of the learned counsel for the plaintiff were certainly ingenious, and went to the extent of shewing clearly the inconveniences which may frequently arise from the insertion in acts of parliament of clauses which apparently do not refer to the objects of the act, as expressed by its title; yet they have failed to convince us that the clause referred to is not general in its operation. The objection urged, that the statute is *ex post facto* in its application, and that the courts should therefore by strict construction discountenance such acts, is met by the argument that it is plainly remedial, and should therefore receive a liberal interpretation.

Acts similar in principle to this have been from time to time passed in England, and the courts there have given them a fair and reasonable construction, to carry out the intention of the Legislature. I do not think we should carry out that intention in relation to this act, unless we held the section of it under discussion applied to the relief of the defendants.

Rule absolute.

WEBSTER, APPELLANT, v. MCBRIDE, RESPONDENT.

Apprenticeship—Contracts of.

Contracts of apprenticeship for a less term than seven years, entered into before the passing of the statute 14 & 15 Vic., ch. 11, are not void, but voidable only.

APPEAL from the County Court of Middlesex.

Writ issued 2nd of October, 1854.

Declaration, 11th of November, 1854, states that, heretofore, to wit, on the 16th of April, 1851, by a certain indenture of apprenticeship then made, one part of which said indenture sealed, with the seal of plaintiff and defendant, plaintiff now brings into court, the date whereof is the day and year aforesaid, one John Webster, son of the defendant, did put himself apprentice to plaintiff to learn the art, trade, &c., of a blacksmith, and with him, after the manner of an apprentice, to dwell, continue and serve from the date thereof, until the full end and term of four years—that is to say, until the 24th day of September, 1854, then next following the

date thereof, and fully to be complete and ended; and by the said indenture the said plaintiff covenanted and agreed with the said John Webster therein named, that he, the plaintiff, would teach and instruct or cause to be taught and instructed after the best way and manner he could the said John Webster, in the trade of a blacksmith, with all things belonging thereto; and also that he, the plaintiff, would find and allow to the said apprentice meat and drink, washing and lodging, during the said term of years in such indenture named; and that he, the plaintiff, would well and truly pay or cause to be paid to the said apprentice, during said term, the sum of seven pounds ten shillings of lawful money of Canada, for the first year, the sum of eight pounds fifteen shillings for the second year, the sum of ten pounds for the third year, and the sum of eleven pounds five shillings for the fourth and last year; and also that the first of said payments would be made by the plaintiff on the fourth day of September then next, and that the subsequent three payments would be made on the same day of the month, in each and every of the three years next succeeding the said first payment; and the said defendant, in consideration of the covenants and agreements aforesaid, in the said indenture named, to be performed by the plaintiff with the said John Webster therein named, did, by an additional covenant and agreement, subscribed and added to the said indenture, and sealed with the seal of the said defendant, and which the plaintiff now also brings here into court, the date whereof is the same day and year in said indenture named thereby bind himself and covenant with the plaintiff for the true and faithful performance and observance by the said John Webster of all the matters and things, covenants and agreements in the said indenture of apprenticeship first above mentioned and contained on the part and behalf of the said John Webster to be observed, performed and fulfilled; and the said defendant did, by said additional covenant and agreement, added to said indenture, and sealed as and of the date aforesaid, thereby further bind himself and covenant with the plaintiff, that in the event of the plaintiff sustaining any loss or damage through the negligence or default of the said John

Webster, as such apprentice, to perform the covenants on his part in said indenture contained, he, the said defendant would reimburse and pay to the plaintiff the full amount or value of such loss or damage, as by the said indenture of the said John Webster, and the covenants of the said defendant thereon and thereto added as aforesaid, reference being thereto had, will amongst other things more fully and at large appear; by virtue of which said indenture first above recited and mentioned, the said John Webster afterwards, to wit, on the said sixteenth day of April, one thousand eight hundred and fifty-one, entered and was then received into the service of the plaintiff, as such apprentice as aforesaid, and remained and continued in such service under and by virtue of the said indenture for a long space of time, to wit, from the day and year last aforesaid until and upon, to wit, the fifth day of November, one thousand eight hundred and fifty-three; and although the plaintiff hath always, from the time of the making of the said indenture hitherto, well and truly performed, fulfilled and kept all things therein mentioned and contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, yet the plaintiff in fact saith, that the said John Webster did not, nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof, the said John Webster, during the said term, to wit, on the fifth day of November, one thousand eight hundred and fifty-three aforesaid, did unlawfully absent himself, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture, and of the said additional covenant of the defendant thereto added, subscribed and sealed, and in that behalf made as aforesaid; whereby, and by reason of which absence and breach of covenant of the said John Webster, the plaintiff hath lost and been deprived of all the profits, benefits, gains and advantages, which he might and otherwise would have derived and acquired from the performance of the said covenant by the said John Webster, and from and by the labour and services of the said John Webster

from the fifth of November, one thousand eight hundred and fifty-three, to the said twenty-fourth day of September, one thousand eight hundred and fifty-four, and amounting in the whole to a large sum of money, to wit, the sum of fifty pounds; and the plaintiff saith, that although he hath sustained the said loss and damage by the said breach of covenant of the said John Webster, yet the said defendant did not nor would perform the said additional covenant with the plaintiff as aforesaid, and pay unto the plaintiff the amount of such loss, according to the true intent and meaning of the said covenant, but on the contrary thereof, the said defendant hath hitherto neglected and refused, and still doth neglect and refuse so to do, to the damage of the plaintiff of fifty pounds, and therefor he brings his suit, &c.

Plea—That the said John Webster became the plaintiff's apprentice, and the indenture or articles of apprenticeship in the declaration mentioned was made before the second day of August, in the year of our Lord one thousand eight hundred and fifty-one, and before the passing of the statute passed in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, entitled an act to amend the law relating to apprentices and minors, and which provided for binding apprentices for a less term than seven years, to wit, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and fifty-one, and that by the said indenture or articles of apprenticeship the said John Webster, the son of the defendant, only put and bound himself apprentice to the plaintiff for the space of four years from the making the said indenture or articles of apprenticeship aforesaid; and the defendant saith that the additional covenant and agreement subscribed and added to the indenture or articles of apprenticeship in the declaration mentioned was entered into by the defendant at the time when the said indenture or article of apprenticeship was made as aforesaid, and entirely refer to the said indenture or articles of apprenticeship; and the defendant saith that the said John Webster faithfully served the plaintiff as his apprentice during a large portion of his said apprenticeship, to wit, from the making of the said indenture or articles of appren-

ticeship as aforesaid to the fifth day of November, in the year of our Lord one thousand eight hundred and fifty-three; and while the said John Webster was faithfully serving the said plaintiff, as his said apprentice, he, the said John Webster, declared and announced to the plaintiff, the intention of him, the said John Webster, to avoid the said indenture or articles of apprenticeship, and to depart from the service of the plaintiff; and afterwards, to wit, on the fifth day of November, in the year of our Lord one thousand eight hundred and fifty-three, the defendant saith that in pursuance of the said declaration and announcement of the said John Webster, he, the said John Webster, departed and absented himself from the service of the plaintiff, which is the absence of said John Webster in the said declaration complained of; and so the defendant saith that the said indenture or articles of apprenticeship, and the said additional covenant and agreement so subscribed and added to the said indenture or articles of apprenticeship, became and were utterly void in law to all intents and purposes; and this the defendant is ready to verify, &c.

Demurrer to plea, on the grounds that the said plea in the introductory part thereof offers to put in issue and to affirm matter not denied by the plaintiff—viz., the making of the indenture of apprenticeship in the declaration mentioned, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and fifty-one, before the passing of a certain act relating to apprentices and minors, on the second day of August, one thousand eight hundred and fifty-one, and that the said John Webster, by said indenture, only bound himself apprentice to the plaintiff for the term of four years from the making thereof; and that the said plea does not state any privity in relation between any matter or thing in said statute mentioned and the cause of action arising from the breach of covenant in said indenture contained, and in the declaration mentioned; that the statement of such extraneous facts is irregular; is not a traverse of the indenture and covenant in the declaration mentioned; does not contain in them any matter in denial or avoidance of the said indenture, or of the causes of action in the declaration

mentioned; and also that the said plea is bad, insufficient and informal, in that it avers that the indenture or articles of apprenticeship in the declaration mentioned was made before the passing of the statute passed in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, entitled an act to amend the laws relating to apprentices and minors, whereas the said plea should have averred, if such were the fact, that the said act of parliament was made or passed in a session of parliament held in the fourteenth and fifteenth years of the reign of Her said Majesty; and that the said act of parliament is not described with sufficient certainty in said plea. Also, that the said plea is bad, insufficient and uncertain in this, namely, that it is thereby averred that the said John Webster, son of the said defendant, in said plea named, faithfully served the plaintiff as his apprentice, during a portion of his apprenticeship, to wit, from the making of the said indenture to the fifth day of November, one thousand eight hundred and fifty-three; and that on the second day of November, one thousand eight hundred and fifty-three, the said John Webster declared his intention to the plaintiff to avoid the said indenture and to depart from the services of the plaintiff, and afterwards, in pursuance of such declaration and announcement, on the fifth day of November, one thousand eight hundred and fifty-three, departed and absented himself from the service of the plaintiff; and that said averment in said plea contains no sufficient answer to the breaches of covenant and causes of action in said declaration mentioned, and does not contain any matter in confession or avoidance of said breach and cause of action in the declaration mentioned; and also, that the said plea is bad in this, that it states no sufficient answer in law to the plaintiff's cause of action in declaration alleged; that notwithstanding that it is stated in the introductory part of the said plea that the said John Webster became the plaintiff's apprentice before the passing of a certain statute in the said plea mentioned, yet the plea does not allege that by reason of anything in the said statute contained the said articles of apprenticeship and additional covenant in the declaration mentioned became void, and by the said plea it is admitted

that the said articles of apprenticeship and additional covenants in the declaration mentioned, was much before the passing of the said act, yet it is not alleged that the said act had a retrospective effect as to the making of the said articles of apprenticeship and additional covenant in the declaration mentioned, in that the said act rendered the same void; and further, the said plea is bad and insufficient in this, to wit, that it alleges as a reason for the said John Webster absenting himself not that the said indenture was void, or that he had a right to absent himself, but the said apprentice's determination to leave; and further, that the said plea is bad in this, that it does not confess the plaintiff's cause of action or admit the breach of covenant by the defendant and avoid the same by virtue of the said act; and further, that the said plea is bad in this, that it is pleaded as if the action was against the apprentice when it is against his surety; and also, that the said plea is, in other respects, bad, informal, inconsistent and insufficient.

Judgment was given in the court below in favour of the demurrer, and the case was appealed and argued before this court during the present term.

MACAULAY, C. J., delivered the judgment of the court.

The indenture, being made on the 16th of April, 1851, preceded the statute 14 & 15 Vic. ch. 11, which was passed the 2nd of August, 1851.

The cases reported in *Harden*, 323-4, 2 *Strange* 1066; *Bur. Sel. cases* 91, Pt. 28; and the cases of *Gray v. Cookson* (16 *East*. 13, 25, 26); *Exparte Davis* (5 *T. R.* 715-6); *Cumming v. Hill* (3 *B. & A.* 59); *Rex v. The Inhabitants of Sandhurst* (7 *B. & C.* 563); the case of *Fish v. Doyle* (*Draper* 340), in which the subject was much discussed; *Dal-lingham v. Wilson*, (Easter Term, 3 *Vic. U. C. R.*); *Shea v. Choal* (2 *U. C. B. R.* 211); *Black v. Stevenson* (3 *U. C. B. R.* 160); *Connell v. Owen* (4 *U. C. C. P. R.* 113); seem to have determined that indentures of apprenticeship for less than seven years are not void, but voidable only, even in England, and certainly in Upper Canada; independently of which the case of *Smedley v. Gooden*, (3 *M. & S.* 189),

shews that the additional ground suggested by the court below that it did not appear that the apprentice was a minor at the time the indenture was entered into, puts an end to all question on the subject.

It appears to me, therefore, that the decision of the court below was in accordance with the previous authorities, and that no sufficient ground is shewn for our reversing it; wherefore it should be affirmed with costs.

McLEAN, J., and RICHARDS, J., concurred.

Per Cur.—Appeal dismissed with costs.

HOLME V. TURNER ET AL.

New trial.

In an action on the case against the occupier of a mill for damage to the plaintiff's close occasioned by back-water from defendants' dam, where the defence relied upon was a prescriptive right to back water for twenty years before action, and there being contradictory evidence as to such right, and the case having been tried by a special jury, and occupying two days, the court refused to disturb a verdict for the plaintiff, and discharged defendants' rule.

Writ issued 22nd of July, 1854; declaration, 22nd of September, 1854.

CASE.—First count—That the plaintiff was possessed of a close in the township of Brantford, near the Grand river, from which close a small stream of water ran into the said river; and that the waters of both, before and at, &c., of right ought to have run past and from said close in its usual and natural flow, &c.; yet that defendants, on, &c., wrongfully obstructed the said river and water-course leading from said river, and again into the said river, and in and across the said water-course below the plaintiff's close, and wrongfully upheld and maintained such obstruction, and also kept, maintained, and upheld two dams and ditches in, upon, and across a branch of the said river and dam across a water-course leading from said river below said close, &c., and thereby stopped and penned back the waters of the said river and small stream below plaintiff's said close, and caused the same to flow back on the same close; whereby, &c. Second count states the close to have been in possession of George S. Wilkes and

Joseph Morrell, as tenants to plaintiff, the reversion being in plaintiff, and then states similar river, water-courses, &c., and back-water, and injury to the reversion. Third count—Similar to the last, only more general and shorter. Fourth and fifth counts—Like the second and third, except that the possession is stated to be in Adam Scott Turnbull and Peter O. Bangoun, as tenants of plaintiff.

Pleas.—First: Not guilty to the whole, similiter and issue. Second to first count—That defendants were occupiers of a mill, &c., tenants to James Kerby, situate on the close of said Kerby, lower down the said river than plaintiff's close, and near to and adjoining the same; and that defendants and all occupiers for the time being of said mill, &c., had, and actually enjoyed as of right, and without interruption, for the full period of twenty years next before the commencement of this suit, the right, benefit, and easement of obstructing the said river and water-course, &c., below the close of plaintiff, &c., for supplying said mill with water, &c., and so justify overflowing plaintiff's close to a small extent and necessary degree, &c. Third, to first count—Plaintiff not possessed; to the country. Fourth, to first count—That plaintiff was not by reason of the supposed grievance injured in his possession of the said close *modo et forma*; to the country. Fifth to second count—Similar to the second plea to first count. Sixth, to second count—Wilkes and Morrell not possessed as tenants of plaintiff. Seventh, to second count—Plaintiff not injured in his reversionary interest by the said supposed grievances *modo et forma*. Eighth, to third count—Similar to fifth plea, except that it does not name the count, but is pleaded to the whole and in shorter terms. Ninth, to third count—Similar to sixth plea. Tenth, to third count—Similar to seventh plea. Eleventh, to fourth count—Similar to the fifth plea. Twelfth, to fourth count—Turnbull and Bangoun not possessed as tenants of plaintiff, &c. Thirteenth, to fourth count—Reversion not in plaintiff. Fourteenth, to fourth count—Similar to fifth and seventh pleas. Fifteenth, to fifth count—Similar to eighth plea. Sixteenth and seventeenth, to fifth count—Similar to twelfth and thirteenth, pleas. Eighteenth, to fifth count—Similar to seventh, tenth, and urteenth pleas.

Replication.—Similiter to first plea. Second—Traverses the second plea, and concludes to the country. Seventh and eighth—Similiters to seventh and eighth pleas. Eighth—Traverses the eighth plea, and concludes to the country. Ninth and tenth—Similiters to ninth and tenth pleas. Eleventh—Traverses the eleventh plea, and concludes to the country. Twelfth, thirteenth, and fourteenth—Similiters to twelfth, thirteenth, and fourteenth pleas. Fifteenth—Traverses the fifteenth plea, and concludes to the country. Sixteenth, seventeenth, and eighteenth—Similiters to sixteenth, seventeenth, and eighteenth pleas.

At the trial, before *Robinson, C. J.*, at the last autumn assizes for the county of Brant, the case on the evidence turned upon the fact of twenty years' uninterrupted enjoyment as of right, in relation to the Kerby mill and dams respectively. The jury found a verdict for the plaintiff and one shilling damages. The case occupied two days, and the jury, at the close of the court on the first day, viewed the premises.

Two questions were made and left separately to the jury—First, whether defendants' dams caused any back-water upon the plaintiff's close; second, whether the defendants had enjoyed the privilege of so doing as of right, and without interruption, for twenty years before action brought—that is, before the 22nd of July, 1854. As to the first, the Chief Justice saying he refrained as much as he could from going into the evidence by which it was endeavored to be proved that it was physically impossible, upon scientific principles, that the dams could occasion the injury complained of; all of which, however, they had heard, and which, with the plans before them, had been fully explained by the counsel and witnesses; he read the whole evidence, as noted by him, to them, and observed on the testimony as to the alteration said to be visible in the state of the creek in or near the plaintiff's land before and since the erection of the defendants' dams, and asked the jury to find whether it was true that the plaintiff's land had been overflowed by the defendants' dams, and if so to find for the plaintiff, though the injury may have been small. The jury found for the plaintiff, with one shilling damages, on the issues of not guilty, and denying damage.

The case then proceeded upon the pleas of prescription, and much evidence was given on both sides, the defendants endeavoring to establish that of the two dams the upper one was first erected in 1832, and the lower one in 1833,—both more than twenty years before the commencement of this action; also that the mill was raised in 1834 and finished in 1835, but that the back-water caused by the dams had preceded the action by full twenty years and more. The plaintiff gave evidence to shew that the mill was not commenced or raised till the summer of 1835, and not finished or at work till the winter of 1836; wherefore, admitting the dams to have been erected the previous year, the alleged twenty years' enjoyment, reckoned from the 22nd of July, 1854, back, was repelled.

At the close of the case the Chief Justice told the jury that the verdict on the first point had established that the defendants had wrongfully overflowed the plaintiff's land before action brought, and the question raised under the present issue was, whether they had done so to any extent,—not to as full an extent for excess was not replied; but that it was necessary for the defendants to shew that they had by their dams interfered with the natural flow of the water for twenty years before and up to the bringing of this action without any permission by the plaintiff, but as of right, so as to back the water upon the plaintiff's land,—not so far, perhaps, as the jury may have found it was so overflowed, but to some extent: that the evidence was so very conflicting, and from many respectable witnesses, that he left it to the jury entirely, reminding them that the question was, whether the water was backed more than twenty years ago on the plaintiff's land by the defendants' dams, not whether the mill was built sooner or later, nor even the dam or embankment, but whether the defendants or Kerby had so long exercised the privilege of actually overflowing the plaintiff's land to some extent; also saying to them that if at last they found the point of fact uncertain, they were to consider, on the one hand, would it establish that there was, or that defendants had no right to keep up this or their dam, and might have the effect of rendering useless a valuable property which had at least been

long enjoyed, and, as it would seem, without complaint; on the other hand, that the plaintiff was only insisting on a plain legal right to have the water flow in its natural course, and that the twenty years' enjoyment which was to extinguish the right, to some extent at least, should be clearly shewn.

The jury found for the plaintiff, with one shilling damages.

In the following term Dr. *Connor, Q. C.*, for defendants, obtained a rule on plaintiff to shew cause why such verdict should not be set aside and a new trial granted, on the ground that such verdict was contrary to law and evidence, or against the weight of evidence.

Galt, and Cameron, M. C., shewed cause, and contended that the cause having been tried by a special jury and fully gone into, and all depending upon the facts and evidence, the verdict ought not to be disturbed; that it was left to a jury to decide the two points—first, whether there was any back water, as complained of; and, that being found, second, whether the defendants had enjoyed twenty years, &c., which issue was also found for the plaintiff.

Dr. *Connor*, in reply, urged that the question was of vital importance to the defendants that the dams only gave a head of four-and-a-half feet of water, and the least diminution would destroy the working of the defendants' mill; that the evidence was by no means clear in favor of the verdict, but very conflicting; that as to the fact whether the dams caused any back-water upon the plaintiff's land, the weight of evidence was, he was disposed to think, in favor of the verdict; but that, on the more material question of prescription enjoyed for twenty years, the weight of evidence was against the finding of the jury, as a careful examination of the evidence, to which he referred the court, would shew.

MACAULAY, C. J.—Having perused the notes of evidence of the learned Chief Justice, I can only say, it appears to me that it formed, as he considered it, a case of conflicting evidence, remarkable in the variances of the different witnesses as to the year in which undoubted events took place, and for the confidence with which disinterested and respectable persons expressed themselves upon the point of time, relying as

they did upon occurrences well calculated to impress the memory and to insure accurate recollection in the several witnesses. Under such circumstances, I cannot but regard it as a case entirely for the consideration of the jury; and having been investigated by an intelligent jury under the direction of a most able judge, patiently devoting two days to the inquiry, I cannot say the result arrived at in either branch of the case is so doubtful or unsatisfactory as to warrant the court in granting another trial. I could not say on this evidence that a verdict the other way would be more in accordance with its weight, or more probably correct in point of fact; and it is not represented that other material and additional evidence could be given; both parties seem to have gone fully into the question, after a former trial of the same matters, between other parties in the same interest, when the verdict was the other way; and, however hard it may operate to the prejudice of the defendants, I cannot say I think the present verdict wrong, or that it is less in accordance with the weight and force of the evidence than the former.

The plaintiff's close seems to have been granted by the court only in 1836. If such grant within twenty years would be a conclusive answer to the plea of prescriptive enjoyment, it has not been replied; and the provincial statute 10 & 11 Vic. ch. 5, secs. 2 & 8, seems to shew that, if relied upon, it should have been replied, and that it would not, even if replied, have displaced such plea.

MCLAN, J., and RICHARDS, J., concurred.

Per Cur.—Rule discharged.

GAUTHIER V. BLIGHT.

To debt on a judgment of the Superior Court of Lower Canada the defendant pleaded want of service of process, &c.; want of knowledge of the proceedings of the plaintiffs in the said suit; and that at the time of the commencement of the said action in which the said judgment was obtained in the said Superior Court, he, the defendant, was and from thence hitherto continually hath been, and still is, resident without the jurisdiction of the said last mentioned court—to wit, at the city of Toronto, in the Province of Upper Canada.

Held bad on demurrer, on the ground that by the plea the defendant should have denied his being formerly resident or domiciled within the jurisdiction of the court in Lower Canada, and his having real or personal property therein, &c.

DEBT on a judgment of the Superior Court of Lower Canada.

Writ issued 16th of December, 1854—declaration, 21st of April, 1885, alleges that plaintiff, heretofore—to wit, on &c.—at Quebec, in that part of the province of Canada formerly called Lower Canada, in the Superior Court of Lower Canada, holding pleas at Quebec, in and for the district of Quebec, before the justices of said court, by the consideration and judgment of said court, recovered against the defendants jointly and severally, as well a certain debt of £83 4s. 5d. with interest from, &c., as also costs, &c., which in and by said court were adjudged to the plaintiff, whereof defendants were convicted, as by the record remaining in the said court may more fully appear, which said judgment still remains in the said court in full force, &c.; and plaintiff in fact saith that the costs were taxed and allowed by the court at, &c.; and that the debt aforesaid and costs so taxed as aforesaid were and from thence hitherto have been and still are of great value, to wit &c., and that plaintiff hath not obtained execution nor satisfaction of the same; wherefore an action hath accrued, &c.; yet, &c., to the plaintiff's damage of, &c.,

Plea by defendant Blight, that although the judgment in declaration mentioned was in fact obtained by the plaintiff against defendants, yet defendant Blight was not at any time served with any process issuing out of the said Superior Court for Lower Canada in said declaration mentioned, at the suit of plaintiff, for the cause of action upon which the said judgment was obtained as aforesaid, nor had the defendant Blight any notice of any such process, nor was he ever

summoned in or notified of said action, &c.; and further, that at the time of the commencement of said action in the said Superior Court of Lower Canada, he, the defendant Blight, was and from thence hitherto continually hath been and still is resident without the jurisdiction of the said last mentioned court, to wit, at the City of Toronto, in that part of the Province of Canada called Upper Canada: concluding with a verification.

Demurrer to plea, on the grounds—first, of duplicity in setting up several distinct defences—that is, the want of process, the want of knowledge by Blight of plaintiff's proceedings in said suit, and the residence of defendant in the City of Toronto, &c.

Second, Not shewing by said plea that the cause of action upon which the said judgment was rendered was not properly cognizable by the Superior Court for Lower Canada, nor hath the defendant Blight shewn by said plea that he was not at or during the time the said cause was commenced or pending, or when the said cause accrued, subject to the laws of Lower Canada, although resident in Upper Canada, nor hath he denied possession or ownership of property real or personal, or heritable, or otherwise within the time aforesaid, within the jurisdiction of the said Superior Court, or that he had at any time before resided within such jurisdiction.

The demurrer was argued during this term by *Helliwell*, for plaintiff, and *Paterson*, for defendant.

MACAULAY, C. J.—We are required to take judicial notice of the provincial statute relative to absentees under the provisions of which this action may have been brought. See the statutes 7 Vic. c. 4; 12 Vic. c. 38, sec 94; 14 & 15 Vic. c. 60; 16 Vic. ch. 194; *McPherson v. McMillan* (3 U. C. Q. B. R. 33), *Ferguson v. Mahon* (11 A. & E. 179), *Cowan v. Braidwood* (1 M. & G. 880), *Douglas v. Forrest* (4 Bing. 686), *Reynolds v. Fenton* (3 C. B. 187), *Sheehey v. The Provincial Life Assurance Company* (17 Ju. 651), S. C. (1 Common Law Reports, 583), S. C. (21 Eng. Reports, 268), *Montreal Mining Company v. Cuthbertson* (9 U. C. Q. B. R. 78).

The plea is insufficient; it does not deny that the defendant was formerly domiciled or resident within the jurisdiction of the court in Lower Canada, or that he had not property, real and personal therein.

He may have been proceeded against as an absentee debtor under the statute, consistently with all that is stated in the plea.

He is moreover sued jointly with another person for a joint as well as a several debt, and his joint contractor may have been served and had full notice of and may have defended the action on behalf of both, for all that appears to the contrary.

The case of *Cowan v. Braidwood* shews that the plea should have gone further, in the present state of the law in Lower Canada.

MCLEAN, J., and RICHARDS, J., concurred.

Judgment for the demurrer.

CARMAN V. MOLSON.

Deed—Construction of.

A, by deed, conveyed to B *all and singular those lands and premises, with the appurtenances, situate, lying, and being at Point Iroquois Canal, in the township of Matilda, being composed of the wharf, storehouses, and appurtenances built on part of the east half of lot number twenty-four in the first concession of the said township south of said Point Iroquois Canal, commonly known as Carman's wharf.*

Held, that by such deed all the premises known as Carman's wharf would pass to B, although part of said wharf was in fact built in front of lot number twenty-three.

EJECTMENT.—The plaintiff claims so much of the wharf called Carman's wharf as lies in front of lot No. 23, &c., as not being embraced in an indenture of conveyance made the 16th day of December, 1851, per statute, whereby, in consideration of one hundred pounds, the said plaintiff did grant unto the said defendant and his heirs, in fee, "*all and singular those lands, premises, with the appurtenances, situate, lying, and being at Point Iroquois Canal in the said township of Matilda, being composed of the wharf, storehouses, and appurtenances built on part of the east half of lot No. 24 in the first concession of the said township, and lying south of said Point Iroquois Canal, commonly known as Carman's wharf.*"

No part of the wharf was built on part of lot No. 24, but part of the wharf, with the storehouses, was erected in front of said lot No. 24; and other part of such wharf, and projecting furthest into the water of the River St. Lawrence, was erected in front of lot No. 23, the whole forming one wharf, and known as Carman's wharf. It was said that the part in front of lot No. 24 was first built and called the old wharf, and the part in front of lot No. 23 afterwards, and called the new wharf, but both existed and were together known as Carman's wharf at the time the above mentioned conveyance was executed. A verdict was rendered for the defendant.

During this term *Vankoughnet, Q. C.*, obtained a rule on the defendant to shew cause why the verdict should not be set aside, as being contrary to law and evidence.

Macdonell, Q. C., shewed cause, and contended the deed transferred the wharf,—both that part in front of lot No. 23, as well as in front of lot No. 24. He referred to Shephard's Touchstone, 847; *Notman v. McDonald*, 5 U. C. Q. B. R. 321; *Murray v. Smith*, *ib.* 225; *Crampton v. Carpenter*, 1 Eng. Rep. 307; *Cruise's Dig.* 259.

Vankoughnet, Q. C., in reply, contended it was not a deed of Carman's wharf, but only of the wharf, storehouses, and appurtenances built on part of the east half of lot No. 24, and that the words added, "known as Carman's wharf," could not be construed to extend its operation to that part of the wharf which was in front of No. 23. It may be read thus transposed: the wharf, &c., lying south of the said Point Iroquois Canal, commonly known as Carman's wharf, and built on part of the east half of lot No. 24, &c.

MACAULAY, C. J.—The first part of the description is correct—namely, the wharf, storehouses, and appurtenances. The lot is mentioned to point out their locality, but is erroneous; what follows aids the mistake, and shews distinctly what wharf, storehouses, and appurtenances were intended.

If restricted to the lot mentioned, nothing would pass; rejecting it, all is right.

MCLEAN, J., and **RICHARDS, J.**, concurred.

Rule discharged.

MCGREGOR v. DALY ET AL.

Promissory note.

Plaintiff sued on a promissory note made by the defendants (four in number) in these words, "We or either of us promise to pay to A. B., treasurer of, &c., or to his successor or successors in office, or order," &c. One only of the defendants pleaded that he did not make the note.

Held, 1st. That it was not necessary for the plaintiff to prove that the note was made by all the defendants.

2nd. That the court will not raise an objection against the merits not taken by counsel.

3rd. That the words "or to his successor or successors in office," are void or surplusage.

ASSUMPSIT on promissory note, declared upon as made by defendants and others.

Defendant pleaded alone that he did not make the note.

It appeared in evidence to be a note made on the 4th of January, 1853, by the four defendants, whereby "We or either of us promise to pay the plaintiff, treasurer of, &c., or his successors in office or order, £1000, four months after date."

At the trial the defendants' counsel objected that the plaintiff should prove that the note was made by all the defendants, which was overruled, and the jury found for plaintiff.

Miller obtained a rule nisi for a new trial, on the ground of misdirection, &c., citing *Sumpter v. Cooper*, 2 B. & Ad. 226. On moving he also objected that the plaintiff was not entitled to recover, not appearing to be still treasurer; but at the argument he appeared to give up this point.

Read shewed cause.

MACAULAY, C. J.—The only doubtful point seems to have been overlooked, and the court will not raise an objection against the merits not taken by the defendants' counsel—*Blanckenhagen v. Blundell* (2 B. & Al. 417), *Ferris v. Bond* (4 B. & Al. 679), *Byles*, 69, 70, 59; *Peto v. Reynolds* (9 Ex. R. 410, S. C. 18 Ju. 472).

The plaintiff is a trustee for the municipality, and the note is not in the alternative, like the case of a note payable to A. or B. which might be paid to either. Here it is payable to plaintiff or order, with the words "or to his successor or successors in office" intervening. These words are inoperative; it could not be made so payable; the plaintiff, as

treasurer, was not a corporation; and the words so introduced are merely void; as if the word heirs had been substituted for successors—*Rex v. Box* (6 Taunt, 325.)

McLEAN, J., concurred.

RICHARDS, J.—The case of *Rex v. Box* (6 Taunt. 325) seems to be an authority in favor of the plaintiff, that the note being payable to him "*or his successor*" may nevertheless be a good promissory note. There does not appear from the learned judge's notes to have been any objections taken at the trial, on the ground that there was a variance between the note declared on and the one given in evidence.

The principal objections urged there seems to have been that, as the plaintiff is described in the note as treasurer, he could not sue on it in his own name, and that, as treasurer, he could not sue at all. The argument, that he could not sue in his own name does not appear to me to be tenable, as his being mentioned as treasurer in the note is only matter of description. *Robertson v. Sheward et al.* (1 M. & G. 511) is authority to shew, if the note had been payable to the treasurer of the county of Perth, and plaintiff had shewn that he held the office at the time the note was made and the action brought, he could sue in his own name, and would be a trustee for the benefit of the county. I think, therefore, the verdict must stand.

Per Cur.—Rule discharged.

BATCHELOR V. THE BUFFALO AND BRANTFORD R. W. C.

Action for negligently carrying the plaintiff on defendants' road, whereby he sustained great bodily injury. Plea not guilty, which was withdrawn at the trial, and damages assessed by the jury at £6178 11s. 7d.

The court granted a new trial on terms, saying that after the best consideration they could not but regard the damages as very large and exceeding what they considered reasonable.

CASE, for negligently carrying the plaintiff on defendants road, whereby he sustained great bodily injury, including the loss of a leg, &c.

The defendants pleaded not guilty.

At the trial defendants' counsel withdrew such plea, and admitted plaintiff's right to recover, reducing the case to a mere assessment of damages; and the damages were assessed before Mr. Justice Draper, at the last spring assizes, at £6178 11s. 7d.

Galt obtained a rule to set aside such assessment, for excessive damages.

How the accident occurred, or the circumstances of the event, were not proved at the assessment; but the plaintiff proved the serious injury he had sustained, and the sickness, suffering and expense which he incurred in consequence.

M. C. Cameron, in shewing cause for plaintiff, referred to Russell's case in Lower Canada, where a large sum in damages was given for an accident in a stage coach—*Hewlett v. Cruchley*, 5 Taunt. 280; *McDonald v. Cameron*, 4 U. C. Q. B. R. 1; *Robertson v. Meyers*, 7 *ib.* 423; *Creed v. Fisher*, 9 Ex. R. 472.

Galt, for defendants, referred to *Ducker v. Wood*, 1 T. R. 277; *Duberley v. Gunning*, 4 T. R. 651; *Jones v. Sparrow*, *ib.* 257; *Chambers v. Caulfield*, 6 East, 244; *Blake v. The Midland Counties Railway Co.*, 16 Ju. 562; S. C., 10 Eng. R. 437; *Theobald v. R. W. Passenger Assurance Co.*, 18 Jur. 583; S. C., 26 Eng. Rep. 440; *Mellin v. Taylor*, 3 Bing. N. S. 109; 4 Chitty Prac. Law 64; *Sharpe v. Brice*, 2 W. B. 942; *Leith v. Pope*, *ib.* 1327; *Pleydell v. Earl of Dorchester*, 7 T. R. 529; *Wood v. Hurd*, 2 Bing. N. S. 166; *Bracegirdle v. Orford*, 2 M. & S. 77; *Baker v. Bolton*, 1 Camp. 493; *Flemington v. Smithers*, 2 C. & P. 292.

MACAULAY, C. J.—The court feel the great difficulty that exists in the way of their setting aside verdicts for excessive damages in cases like the present. At the same time, after the best consideration, we cannot but regard the damages as very large and exceeding what we consider reasonable; not that any sum could adequately remunerate the plaintiff for the personal injury and suffering he has sustained, it being irreparable; but in the sense in which pecuniary compensation is allowed and awarded in actions against stage coachmen or railroad companies carrying passengers for hire.

That certain hazards attend such modes of travelling is known to travellers; and although the owners do undertake and are bound to carry them safely so far as in their power, still serious accidents, it is well known, may happen, from slight degrees of negligence.

Carriers of passengers are not insurers like common carriers of goods, and are only liable for negligence, including of course the consequences of the injurious act or tort which constitutes the negligence.

When negligence is established or admitted, the question of damages no doubt rests with the jury under the circumstances in evidence; still the cases on the subject seem to indicate that such damages require the exercise of a sound discretion, with a view to afford pecuniary redress to the injured party for the damages he has sustained—*Blake v. The Mid. R. W. Co.* (16 Jur. 562), *Theobald v. R. W. Passenger Assurance Company* (18 Ju. 583). It is difficult to say here that the jury have acted upon any wrong principle, or been actuated by improper motives; still it does not appear to the court that they have exercised a sound and reasonable discretion. The grievous bodily injury and suffering of the plaintiff may have influenced them in awarding so large a sum; no doubt it did, for there was little else laid before them on the subject. But, however attended with difficulty as a precedent for disturbing verdicts on grounds so peculiarly within the province of the jury, we have to consider, that to confirm it, might be to form another, which might prove inconvenient, and be in other points of view not reconcilable with the exercise of a sound judicial discretion. We think therefore that we ought to grant this rule upon terms, unless the parties can agree to reduce the verdict to a smaller sum. If not, we think the rule should be made absolute, but only on payment of costs, and upon payment into court of the sum of £500, with leave to the plaintiff to take that sum without prejudice to his claims for damages *ultra* at another trial—the defendants, if so advised, being at liberty to add a plea of such payment into court, the same and costs to be paid on or before the first day of August next; in default of which the rule is to be discharged. We exact this

condition not because we consider the sum mentioned to be sufficient to cover the plaintiff's damages, but because the plaintiff has manifestly sustained great damage and been put to much expense, and we do not feel that we can relieve the defendants from the present verdict without their indemnifying him in a sum sufficient to cover his expenses and to enable him to take the case down to another trial, which the defendants desire to have.

Of course, if the whole sum were paid into court to abide the result, that would do; but the sum is so large that we do not propose to impose such a condition.

On the terms mentioned, we think we ought to allow the case to go to another jury; but we do not feel justified in so doing on any other terms more favorable to the defendants.

MCDOWELL V. THE GREAT WESTERN RAILWAY.

In a declaration in case for injury done to plaintiff's steers, defendants pleaded that just before said time, &c., said steers were unlawfully depasturing in and upon certain lands adjoining the lands of defendants and said railway, which lands were not the lands of plaintiff, but of one Richard Roe, who had not given license for the said steers to be there; and that the said steers strayed from the said land, where they were so unlawfully depasturing and being as aforesaid upon the defendants' lands adjoining, and thence at the said time when, &c., on to the said railway, and then being so upon the said railway, were accidentally injured without any design or default of defendants.

Held bad on demurrer, for the causes assigned.

Writ issued 8th January 1855: declaration 28th March 1855.

CASE.—Declaration states that at the time of the committing the grievances hereinafter mentioned plaintiff was an inhabitant of, and resident in the township of Clinton, and was then possessed of three steers of great value, to wit, of the value of, &c., which were then lawfully on a highway in said township; and the defendants were possessed of a railway locomotive, and certain railway carriages; and defendants, before the committing of the grievances therein-after mentioned, to wit, on &c., were duly incorporated under and by virtue of certain acts of Parliament of the province of

Canada, and continued so incorporated during the time of the committing the grievances, and had then constructed and made their railroad in pursuance of the powers granted to them by said acts in such manner that part thereof passed through said township and crossed and intersected the said highway therein; and that defendants, after the constructing of said road as aforesaid, and during the time of the committing the grievance hereinafter mentioned, kept and continued the same so constructed and made through and in the said township, and crossing and intersecting the said highway therein. It then alleges that by the statute 4 Wm. IV. defendants were entitled to intersect or cross any stream of water, road or highway between London and Lake Ontario, provided that the corporation should, among other things, erect and maintain during the continuance of the corporation sufficient fences upon the line of the route of their road or way. It then alleges that by act of Parliament the name of the company was changed from the London and Gore Railway Company to the Great Western Railway Company, with power to extend their road to the Niagara river, &c.; whereupon it became and was the duty of the defendants to erect and maintain, and they ought to have erected and maintained, sufficient fences upon the line of the route of their railway, according to the intent and meaning of the said clause or section of the act aforesaid, in and through said township. *Breach*—That defendants did not erect and maintain sufficient fences along the line of the said railroad or way, according to the intent and meaning of the said clause, in and through said township of Clinton, although a reasonable time, to wit, six months, after the constructing of the road had elapsed; but, on the contrary thereof, defendants wholly neglected so to do; by reason whereof, and for want of such sufficient fences upon the line of the route of the railroad or way in and through the said township of Clinton, the said steers of the plaintiff, of the value aforesaid, then, to wit, on &c., got on the line of the route of the said railroad or way in the said township of Clinton aforesaid, and were then and whilst on the said line as aforesaid, run against, struck, tore, and lacerated by the locomotive and carriages aforesaid of the defendants, then

passing on and along the said railroad or way, and the said steers of the plaintiff were then and thereby so greatly injured, &c., that they became of no value to plaintiff, &c.

Plea—That just before the said time when, &c. said steers were wrongfully and unlawfully depasturing in and upon certain lands adjoining the lands of defendants and the said railway, which lands were not the lands of the plaintiff, but of one Richard Roe, who had not given license for the said steers to be there; and defendants say that the said steers strayed from the said land where, &c., they were so unlawfully depasturing and being as aforesaid, upon the defendants' lands adjoining, and thence at the said time when, &c., on the said railway, and then being so upon the said railway were accidentally, without any design or default on the part of the defendants or their servants, injured in manner and form, &c.

Demurrer to plea, on the grounds that the case made out by plaintiff is such that if the defendants had not fenced the line of the route of the railway, and the statements in said fourth plea were true, yet the defendants have not exculpated themselves, and the plea is no answer; and because it is incumbent on defendants to fence, and not having done so (and it is not averred that they had fenced), it is not matter of excuse to them to say that plaintiff's steers were straying, as stated in the fourth plea; that it is argumentative; that the plea does not state that the steers were unlawfully on the railway land when injured, and they may have been there rightfully; that it should have shewn specifically that this injury was unavoidable.

The demurrer was argued during this term by *Connor, Q. C.*, for plaintiff, referring to *Ricketts v. E. & W. India Dock Co.*, 12 C. B. 160; *Manchester Railway Co. v. Wallis*, 18 Ju. C. P. 268.

Burton, for defendants, referred to *Gillis v. The Great Western Railway Co.*, 12 U. C. Q. B. R. 247.

MACAULAY, C. J.—On reference, the following cases will be found applicable:—*Fawcett v. The York and North Midland R. W. Co.* (16 Q. B. 610), *The King v. Morris* (1 B. & Ad. 188), *Ricketts v. E. & W. India Dock Co.* (12

C. B. 160), *Dovaston v. Payne* (2 H. B. 527), *Tupper v. Newton* (14 C. B. 114), *The Manchester R. W. v. Wallis* (25 Eng. R. 373, S. C., 18 Ju. 268), *Gillis v. Gt. W. R. Co.* (12 U. C. R. Q. B. 427), *Dolry v. Ontario, Sim. & Huron R. W. Co.* (11 U. C. R. Q. B. 60), and the case of *Parnell v. G. W. R. Co.* (4 U. C. C. P. R. 517). If we decided correctly in the last mentioned case, I cannot satisfactorily distinguish the present from it. We there held that the defendants were bound to erect and maintain sufficient fences upon the line of the route of the railway where it crossed highways, even against horses straying thereon or being lawfully thereon, as against the company, on the authority of *Fawcett v. The N. W. R. W. Co.* (16 Q. B. 610), of which decision I must say I cannot but approve. Here the defendants do not traverse the allegation in the declaration that the plaintiff's cattle were lawfully on the highway (from which it is alleged they escaped on the railway.) It was traversed in the case in 16 Q. B. 610. But here, without noticing it expressly, the defendants traverse it argumentatively or impliedly by alleging that the cattle were unlawfully upon the lands of Roe, which might have been a highway, the soil of which was owned by Roe, but it also denies any license by him, &c. It adds that from such close they escaped upon lands of defendants, and thence upon the railway, where they were accidentally injured, &c.

The plea does not answer the declaration as it professes to do, by shewing, either that the cattle were not lawfully upon the highway, or not upon it at all, or that before the time when, &c. they had escaped therefrom, and were trespassing upon private closes, or by stating by way of special inducement, that they were so trespassing, with a special traverse of their being on the highway *modo et forma*.

In any point of view, the plea seems to me bad, and not to raise the question intended, merely whether the defendants are bound to fence against cattle trespassing upon private closes adjoining the line of the railroad, and escaping therefrom upon such line, &c.; upon that question, I therefore express no opinion. It seems to me the plea must be held bad on this demurrer.

Judgment for the demurrer.

MASSEY AND MASSEY V. WILLIAM RAPELJE AND JOHN RAPELJE.

Where a plaintiff without serving a defendant accepts the appearance of an unauthorized attorney for the defendant, the court will set aside the proceedings as irregular, although it is not shown that the attorney is insolvent.

Writ, 22nd of February, 1855 : declaration, 7th March, 1855.

ASSUMPSIT for goods sold and delivered, &c. Defendants, by *James Smith* their attorney, pleaded (19th of March, 1855) 1st, non-assumpsit ; 2nd, payment ; 3rd, set off.

The cause was tried before Mr. Justice *Burns* at the last Cobourg assizes, when a verdict was rendered for the plaintiffs £602 10s. 7d. damages ;—no defence. In the following term, *Richards*, for defendants, obtained a rule on the plaintiffs to shew cause why the verdict and the appearance, and all subsequent proceedings, as to both defendants or as to John Rapelje, should not be set aside with costs, on the ground that no writ of summons or other process was served on the defendants or on said John Rapelje ; and that the attorney whose name is entered of record as defendants' attorney was not, nor was his partner or any other person, authorized by the defendants or the said John Rapelje to accept service of process in this cause, or to enter an appearance in this cause for the defendants, or for the said John Rapelje ; and that defendants were not aware of appearance being entered for them, or aware of this suit, until after said verdict was rendered,—referring to affidavits filed, and on the merits disclosed therein, with stay of proceedings in the meantime. He referred to *Bayley v. Buckland*, 1 Ex. R. 1 ; *Hambidge v. De La Crouë*, 3 C. B. 742 ; 10 Jur. 1096 ; *Stanhope v. Firmin et al.*, 3 Bing. N. S. 301 ; *Weir v. Harvey*, 1 U. C. R. 430.

MACAULAY, C. J., delivered the judgment of the court.

It appears to me the rule must be absolute to set aside the proceedings. As to the costs, the defendants are left to their recourse against *Messieurs Smith & Green*, who do not admit the absolute want of authority to appear for defendants.

The facts appearing on the affidavits filed seem too strong

to be got over. The case of Bayley v. Buckland et al. (1 Ex. R. 1) is much in point to shew that where no process has been served upon the defendants, nor any notice of the action brought home to their knowledge, the court will relieve against the verdict, although the attorney who entered appearance for the defendant be not insolvent.

The present case appears to fall within that decision, and should be governed by it. There has been a misapprehension on the subject, by which an appearance has been entered for the defendants without actual service or notice of process upon or to either, and a large verdict obtained against them without their being heard in their defence. Merits are expressly alleged in their affidavits; and however it may delay the plaintiff in his recovery, if entitled to recover, we think the present proceedings must be set aside.

As to costs, we shall not add them to the rule to be paid by the plaintiff to the defendants, but will leave the defendants to settle them with Messieurs *Smith & Green*, who do not admit that they appeared for the defendants without color or absolute want of authority.

THE ONTARIO MARINE INSURANCE COMPANY V. IRELAND.

Shares—Forfeiture of, by owner.

To a declaration for calls under the 10th section of the 12 Vic. ch. 166, the defendant pleaded, that, by reason of the nonpayment of the said calls in declaration mentioned, the said shares, and each of them, became forfeited in pursuance of the statute, and that defendant acquiesced in such forfeiture, of which plaintiffs had notice.

Held, that such plea was bad, in that it did not rest with defendant to forfeit the shares.

Writ issued the 17th of April, 1855: declaration, 26th of April, 1855.

DEBT for calls on twenty shares of the capital stock of the Company, under the form given by the 10th section of the 12 Vic. ch. 166—one call of 10s., and four other calls of 12s. 6d. each, upon each of the said shares, then before duly made by the Company.

Third plea—That before suit—to wit, &c.—by reason of defendant, as owner of said shares, having neglected and refused to pay his ratable and proportionable share of money

called for in respect of said shares, being the said calls in declaration mentioned, the said shares in declaration mentioned were, and each of them was, in pursuance of the act of Parliament in that behalf, forfeited, and defendant then—to wit, &c.—acquiesced in said forfeiture, of which plaintiffs had notice: verification.

Fourth plea—Same as the third, except that it refers to the first only of the five calls in the declaration mentioned.

Demurrer to third plea, on the grounds—First, that it offers no answer to the declaration, but confessing the plaintiff's cause of action, does not avoid it; secondly, that the plea should have shown how the forfeiture occurred, and that the amount due on the calls had been satisfied from the proceeds of the shares so forfeited.

Similar grounds assigned as to the fourth plea.

The demurrer was argued, during this term, by *Burton* for plaintiffs, and *Connor, Q. C.*, for defendant.

MACAULAY, C. J.—There are two pleas demurred to—the first is to the whole declaration, the second is to three only of four calls, omitting the first; both rely upon a forfeiture by reason of defendant's own fault, of which he seeks to take advantage.

The second plea seems inconsistently to set up a failure to pay the first call as creating a forfeiture, wherefore no action accrued for the subsequent call, and yet does not answer the first call, which the plea in effect leaves unanswered, and concedes thereby the plaintiff's right to recover therefor.

The first plea, on the other hand, relies upon the successive forfeitures by successive defaults.

Perhaps, if otherwise good, the plea should have been to the whole; no ground of action by reason of the first default:—The *Marmora Foundry Company v. Murney* (1 U. C. C. P. R. 44); The *Great Northern Railway Company v. Kennedy* (13 Jurist, 1008, S. C. 4 Ex. R. 417); The *Edinburgh Railway Company v. Hebblewhite* (6 M. & W. 707); *Giles v. Hunt* (3 Ex. R., 18); The *Birmingham Railway Company v. Locke* (1 Q. B., 256); *Thompson v. Fuller* (8 Ex. R. 279); Statute 12 Vic. ch. 166, secs. 9 and 10.

The pleas seem to me bad, in not showing a forfeiture declared and carried into effect by the plaintiffs; even if that would do.

The observation of Dr. Connor, that stock being once subscribed for at once becomes a species of property, which upon non-payment of calls may be forfeited, not cancelled, and the consideration that a right of action must have vested in the plaintiffs the instant default was made, and that a forfeiture could not step in before and preclude the right of action vesting, seem to show clearly that it must rest with the plaintiffs, at all events, whether the vested right of action shall be waived by enforcing the forfeiture.

MCLEAN, J., and RICHARDS, J., concurred.

Judgment for the demurrer.

REGINA EX RELATIONE DILLON V. MCNEIL.

Elector—Refusal to take oath.

The refusal of an elector to take the oaths required by the returning officer is a good ground for setting aside an election, if the relator would otherwise have had the majority.

This is an application to reverse the decision of the Judge of the County Court of Kent, on the grounds that the votes on which the defendant was elected were duly qualified votes; that the returning officer should have been made a party, or that defendant should be relieved from the costs, &c.

It appeared that at the last election for ward No 3, township of Raleigh, fifty-two votes were polled for the defendant, and seventeen for the relator. Of the defendant's voters thirty-eight were objected to as being aliens, and who had either refused to take the oath of qualification according to the statute, or to, or from whom, the returning officer had declined to administer, or exact it.

The relator in his affidavit states that the returning officer received and recorded the votes of certain aliens (not saying for whom) against the remonstrances of the relator—that he required the returning officer to administer to the said parties, as aliens as aforesaid, the oath or oaths required by

law, and that the returning officer, in some instances, requested the said parties, as aliens, to take the requisite oath, and in others he did not so request the said parties to take such oath or oaths.

That the said aliens refused to take such oath or oaths; but the returning officer, nevertheless, received and recorded the votes of the said parties, aliens as aforesaid, contrary to law and against the protest, &c. of the relator; that by receiving such votes, some thirty in number, the defendant was made to appear with the greater number of votes, while in fact the relator had the larger number of legal votes, and ought to have been returned.

It was agreed by the counsel on both sides, in writing, that the poll-book should be produced, and the votes objected to be indicated by a note opposite the names thus—"refused to take the oath," except in two additional instances; and that the production of such book should decide finally the question as to whether the parties whose names so appeared as objected to refused to take the oaths, and thereby became disqualified as voters.

The judge decided in the relator's favor, not on the ground of alienage, but because thirty-eight of defendant's voters had refused to take the oath of being natural-born or naturalized subjects of her Majesty; and, striking off the votes of those who so refused, there was a majority of three in the relator's favor. Reference was made to the statutes 12 Vic. ch. 81, secs. 121, 122, 124, 151, 152; 16 Vic. ch. 181.

MACAULAY, C. J., delivered the judgment of the court.

It would seem thirty-eight of defendant's voters refused to take the oath, and were not all, or a portion of them, merely excused or exempted therefrom by the returning officer accepting them as, in his opinion, duly qualified to vote—that is, as being natural-born or naturalized subjects of her Majesty. It appears to me such votes must be struck out, and that the onus is not on the relator to prove them aliens,—the objection is, not that they are aliens, but that they refused to be sworn as to their being subjects; and the objection seems sustained and valid, and the decision of the county judge therefore right.

As to the returning officer being made a party, that rested with the county judge; and this returning officer not being made a party is no sufficient ground for reversing his decision. The defendant not having disclaimed, but having accepted and defended the suit, incurs a liability to the costs in consequence.

MCLEAN, J., and RICHARDS, J., concurred.

Per Cur.—Rule discharged with costs.

ONTARIO INSURANCE COMPANY V. IRELAND.

A call of four per cent. on the first instalment of five per cent. on the capital stock of the company, made by a *quorum* only, and not by a *majority* of the directors, is a good call, under the ninth section of the statute 12 Vic. ch. 166—the Act of Incorporation.

DEBT, for £62 10s. Debt for calls on twenty shares duly made by plaintiffs—one call of ten shillings, and four calls of twelve shillings and sixpence each, upon each share.

This is a rule to enter a non-suit, or to reduce the verdict to the amount of four per cent. upon the first call.

The pleas are:—First, never indebted. Second, that the defendant did not own the shares. The third and fourth pleas are demurred to.

Under the first plea defendant contended that the plaintiffs did not prove £25,000 subscribed before the election of directors; and that when the first call was made it was not by a majority of the directors, but by a *quorum* only. See the stat. 12 Vic. ch. 166, secs. 3, 9, 10, 12, 14.

In October, 1851, the defendant subscribed for twenty shares of £12 10s. each, and £46,000 of stock was subscribed in all; but at what period or when it amounted to £25,000 (sec. 8) does not appear, nor does it now seem material to enquire on these pleadings. In February, 1852, directors were elected to supply the place of retiring directors, (sec. 3) shewing a previous organization by the election of directors, or, at all events, the existence of a board of directors *de facto*.

On the 12th of April, 1852, at a meeting of five directors, four being a *quorum*, (sec. 12), it was agreed to make a call of the four per cent. upon the first instalment of five per cent., being £11 16s., as stated in the judge's notes.

The only question is, whether the first call was well made by a quorum only, and not a majority of the directors.

MACAULAY, C. J., delivered the judgment of the court.

I am disposed to think all right. The statute requires the election of twelve directors (sec. 3), of whom four constitute a quorum (sec. 12). The ninth and fourteenth sections require calls for the payment of instalments by stockholders to be made at meetings when a majority of the directors are present. All the calls in the present instance were so made, except the first four per cent., which was required by a meeting of five directors only. But the ninth section distinguishes between the payment of the first five per cent. and subsequent calls or instalments; it says, of the first, that one per centum shall be paid at the time of subscription, and four per cent. to be ready as a deposit, to be called for by the directors as soon as they may deem it expedient, and the remainder shall be payable in such instalments as a majority of the directors might determine upon, under the regulations therein prescribed, and which are not applicable to the first five per cent.

Now I do not think the four per cent. was required to be called for at a full meeting of all the directors, but that a quorum was sufficient. It is not like future calls—the money was to be ready whenever called for; it was, in short, payable on demand or request by the directors; and for that, in common with the general management and details of business affairs of the corporation, a quorum would seem sufficient, except on those occasions and for those purposes in which the statute requires the meeting to be composed of a greater number.

I think therefore the payment of the four per cent. was required at a meeting sufficiently full, and that the provisions of the statute as to the number to be present at the making of future calls, the periods of payment, the notices and promulgation thereof, &c., do not apply to the four per cent.—balance of the first instalment of five per cent.

The tenth section points out all that the plaintiffs need allege or prove in actions for calls; and it is not contended that due proof was not given of such allegations. I think therefore the rule should be discharged.

MCLEAN, J., and RICHARDS, J., concurred.

TRINITY TERM, 19 VICTORIA.

Present:—THE HON. J. B. MACAULAY, C. J.

“ • A. McLEAN, J.

“ W. B. RICHARDS, J.

CROFT V. THE TOWN COUNCIL OF PETERBOROUGH.

Municipal corporation—Notice of action.

The defendants, as a municipal corporation deriving their power under the statute 12 Vic. ch. 81, having by resolution authorized the raising and levelling of a street within their jurisdiction, which, when done, injuriously affected the plaintiff's property:

Held, that a by-law should have been passed to sanction the act complained of.

Held also, that if the defendants were within the statute 14 & 15 Vic. ch. 54, and had pleaded the general issue “per statute,” they would have been entitled to notice of action. McLean, J., *dissentiente*.

Writ issued 17th March, 1854; declaration, 17th March, 1855, amended.

First count recites that plaintiff was possessed of a house, shop, and tenement, abutting on Hunter-street, in the town of Peterboro', in which said house he with his family resided, and carried on the business of a saloon and eating-house; yet defendants, well knowing, and contriving to injure him &c., on &c., and on divers days &c., wrongfully and injuriously raised the said street, upon which the said tenement of the plaintiff abutted as aforesaid, and the side-walk upon which the tenement next adjoining the said tenement of the plaintiff abutted, several feet, to wit, six feet higher than the same had theretofore been or ought to have been, or to be, and had thence hitherto continued the said street and side-walk so wrongfully and injuriously raised as aforesaid, by means whereof, at divers times and seasons of the year, to wit, in the spring, autumn, and winter, and during and after rain and thaw, the said house, shop and tenement of the plaintiff hath been, and becomes overflowed with water, which ran and flowed, and runs and flows from the said street and side-walk; and by reason of the same having been so wrongfully and injuriously raised as aforesaid, into, through and upon the

said house, shop and tenement of the plaintiff, and remained, and remains in and about and under the same, and became and becomes stagnant, offensive and injurious, whereby, &c.; laying special damage, loss of customers, &c., sickness of family, &c.

Second count states that plaintiff before and at, &c., was possessed of another messuage, house and tenement, abutting on Hunter-street, in the said town of Peterboro', in which said house plaintiff and his family resided and reside, and in which shop plaintiff carried on his business of a saloon and eating-house, &c.

That before and at &c., defendants were engaged in raising the said street (called Hunter-street) opposite plaintiff's said house and shop, to wit, six feet higher than before; and thereupon it became and was the duty of defendants, in so raising the said street, to make and place a sufficient and proper drain or culvert, or to adopt some other sufficient means to carry off and away from plaintiff's said house and shop the water which would otherwise flow from the said street, when so raised, into the said house and shop, so that the same might not be damaged, or plaintiff injured thereby; and that although defendants did raise the said street opposite to the plaintiff's said house and shop, several, to wit, six feet higher than before, yet defendants, not regarding their duty in that behalf, but contriving and intending, &c., to injure the plaintiff, &c., did not make or place any drain or culvert, or adopt any other sufficient means to carry the said water off and away from the said house and shop of plaintiff, according to their duty, and have so kept and continued the same, &c., thence hitherto; by means whereof, at divers seasons, &c., to wit, in the spring, autumn, and winter, and during and after rain and thaw, the said house and shop of plaintiff have been overflowed with water, which flowed from the said street, so raised as aforesaid, and for want of such drain or culvert, or other sufficient means, &c., to carry off and away the said waters from said house and shop, and which water remained and remains in and about and under the same, and becomes stagnant, offensive and injurious, and the plaintiff thereby deprived of the use and enjoyment thereof, and hath lost great gains, &c., and himself and family rendered sick, &c.

Pleas to first count.—First. Not guilty of the said supposed grievances, &c.

Second. Not guilty of raising the said street.

Third. Not guilty of raising the said side-walk.

Fourth. Plaintiff not possessed.

Fifth. As to so much of the declaration as relates to raising the said street, &c., that defendants were incorporated under the Upper Canada Municipal Corporations Act, with the corporate powers and authorities conferred upon defendants by the said acts, and that they were thereby (amongst other things) authorised and empowered to level, pitch, raise, lower and improve any existing street or highway within the jurisdiction of defendants. And that the said street was and is within the town of Peterboro', and within their jurisdiction, and became, and was before, and at the said time when, &c., in some parts thereof, and near and in front of the said house and tenement of the plaintiff, where the same abutted thereon, as in the declaration alleged, uneven, hollow and lower than, and beneath what the surface or level of the said parts of the said street ought to be, and lower and beneath what the surface or grade of the said parts of the said street was determined to be by the said defendants. And that defendants, being such body corporate as aforesaid, and the said street so being within their jurisdiction as aforesaid, and so becoming and being in some parts thereof, and near and in front of the said house and tenement of plaintiff abutting thereon, uneven, hollow, and lower, and beneath what the surface or level of the said part of the said street ought to be, and lower and beneath what the said surface or grade of the said part of the said street was determined to be by the said defendants as aforesaid, it became and was the duty of the said defendants, under the said hereinbefore mentioned acts, to level, raise and improve the said parts of the said street, and to make the surface thereof uniform and level throughout, or as near so as might be, for the more safe, commodious and convenient passing and repassing, and the communicating thereby of the inhabitants within the jurisdiction of defendants, &c.; wherefore defendants, so being such body corporate, in order to improve

the said street, and make the surface thereof uniform and level throughout, or as near as might be, as thereafter in that plea mentioned, did after the passing of the above mentioned acts, and at the said time when, &c., cause to be raised, and raised the said street near and in front of the said house and tenement of the plaintiff, where it abutted upon the said street, as in the said declaration mentioned, and still do keep raised the said street as aforesaid, as they lawfully might—they, the said defendants, then doing as little damage as might be in that behalf, and no further or other damage or injury to the said plaintiff than was necessary, or which by proper diligence and care might be avoided in the execution thereof, for the purpose aforesaid, which are the the same supposed grievances in the introductory part of said plea mentioned: verification.

Replication—Similiter to 1st, 2nd, 3rd and 4th pleas. To 5th plea, that defendants at the said time when, &c., of their own wrong, and without the cause by them in their said last plea alleged, did commit the grievances in the introductory part of that plea alleged, in manner and form as the plaintiff hath above thereof complained against the defendants: to the country and similiter.

Plea to second count—Not guilty. Similiter and issues.

This case was tried before Mr. Justice Burns, when it appeared in evidence that the Municipality of Peterboro' was petitioned to raise the level of Hunter-street, but not expressly at plaintiff's premises, and that a resolution was accordingly passed, under which it was raised three or four feet, and paid for by defendants, but no formal by-law was passed for the purpose. That there were remonstrances and petitions against raising the street from other inhabitants, but they were disregarded, and no drains were made for carrying off the water—although the drains and channels might have been constructed.

The work was done in 1852, and the side-walk raised in 1853. There was much evidence given on the one hand to show that what was done was necessary, beneficial to, and an improvement of the public road; and on the other, that it was injurious, and caused damage to the property of the

plaintiff, and of which he was possessed as a tenant for years. Also, evidence to show that the side-walk at one Ward's was raised by him as his own act, though with the assent of defendants, and a dam made, which caused the water to be turned towards the plaintiff more than naturally. Also, that without the street being raised the water would flow to the plaintiff's premises, naturally passing round the corner of a street called Water-street, and running down Hunter-street. But it was likewise in evidence, that irrespective of what Ward had done, the effect of the raising the street was to throw the water upon plaintiff's premises and into his house and cellar more than would naturally flow there, and that the flood-water did him material damage, especially when the snow melted, or in heavy rains. It also obstructed the access to plaintiff's house, whereby he lost customers, &c. The weight of evidence was, that the work was an improvement to the street as a public highway, but that it caused more water to flow upon the plaintiff's premises, and was otherwise injurious, and a damage to him.

There was, however, some evidence that Hudson, who owned the premises occupied by plaintiff, was in possession when the street was raised in 1852; but it was not clear. At that time Hudson was a member of the municipal council, and in favor of raising the street. At the close of the case leave was reserved to the defendants to move a nonsuit on any legal objections that might be urged; also, to plaintiff to amend the declaration if necessary.

It was then left to the jury to decide,—

1. Whether the raising of Hunter-street was a public general benefit.
2. Whether the defendants had constructed proper drains to carry off the water from the plaintiff's premises.
3. Whether the work which the defendants had constructed injured the plaintiff.
4. What damages the plaintiff should recover if the action is maintainable.

The jury found for the plaintiff, and answered the first and third in the affirmative—the second in the negative, and assessed damages in plaintiff's favor at £40.

In the following term (Easter Term, 1855) *Weller* obtained a rule on the defendants to shew cause why the *postea* should not be delivered to the plaintiff. *A. Crooks*, for defendants, shewed cause during the same term, and contended that the second count, which had been added since the last trial, was not proved, and that it turned on the first count, under which the work was shewn to be a public improvement, and not negligently executed: that the fifth plea put in issue merely the right: that the plaintiff did not reply the want of a by-law, but traversed the plea by the replication of *de injuria*; and that the issues raised did not require proof of a by-law to support the plea. He referred to P. S. 12 Vic. ch. 81, secs. 52, 60, 192, 193. As to the difference between a by-law and a resolution—*Dunston v. The Imperial Gas Light & Coke Company*, 3 B. & Ad. 125; *The Mayor of Lyme Regis v. Henley*, 1 Scott, 29, S. C., 1 Bing. N. S., 222; *Par-naby v. Lancaster Canal Co.*, 11 A. & E. 223, 230.

Weller, in reply, referred to 12 Vic. ch. 81, secs. 60 and 195, and contended that the defendants derived their powers under the statute, and that the authority claimed under the fifth plea was not thereby conferred, the only power being to make by-laws for raising streets, and not to raise streets at discretion without any by-law. Also, that negligence was proved and found, and that with reasonable and due care much of the injury caused to the plaintiff might have been avoided. A question arose with the court, whether the defendants were entitled to notice of action, and the action outlawed; and if so, whether such ground of defence could be taken under pleas of not guilty simply, not adding "per statute," which had been added to the former pleas but omitted in the last.

Crooks, for defendants, referred to *Angel & Ames on Corporations*, 645, and note; *Ib.* 99; *Grant on Corporations*, 154.

MACAULAY, C. J.—Referring to what I said upon the occasion of setting aside the nonsuit, it is to be observed that the pleadings having been altered since that rule was made absolute, the case must be disposed of upon the issues as they appear on the present record.

The first count and the pleas under it are the same as formerly, except that the dates of the declaration and pleas are altered, and the three first pleas are not noted to have been pleaded "per statute," as they were in the first instance.

Referring then to what I said when the nonsuit was set aside, I think this ground of action may be readily disposed of on these pleadings.

The plea of not guilty (not per statute) denies and puts in issue only the wrongful act alleged, and not its wrongfulness. The evidence clearly established the wrongful act alleged, and its injurious consequences to the plaintiff's damage. I think therefore the plaintiff is entitled to the verdict on the first issue to the first count—so also (as being proved) the second, third and fourth. As to the fifth issue, I think it must be taken that the jury in what they answered to the court meant to find all the material facts alleged in the fifth plea in the defendant's favor—namely, that defendants were incorporated and empowered as alleged: that the street was within the town of Peterboro' and within their jurisdiction, and became, and was in some parts thereof, and near and in front of plaintiff's house and premises, where the same abutted thereon, uneven, hollow, and lower than and beneath what the surface or level of the said parts of the said street ought to be (and lower and beneath what the said surface or grade of the said parts of the said street was determined to be by said defendants); wherefore (being their duty) the defendants, in order to improve the said street, and to make the surface thereof uniform and level throughout, as near as might be, caused it to be raised near and in front of plaintiff's house, &c., and still kept it so raised, doing no unnecessary damage. Excess is not replied, but the material allegations of the plea only traversed.

The plea does not allege the passing of a by-law determining the opinion of the defendants as to the state of the road, or their resolution to raise it; nor is the plea demurred to for not stating it; nor is the want of a by-law replied, or any excess, wrongful neglect, or *mala fides* imputed to the defendants by way of replication.

It is, however, contended that the determination of the

defendants as to the state of the road and to raise it are material facts in issue, and should be proved by a by-law. The defendants do not justify themselves upon such a ground; they seem to me merely to show the state of the road, and their determination that it was in such a state, and then submit that it was their duty to raise it.

The sufficiency of the plea, as a legal defence, viewed in this light, is not now the question; and on the former occasion I expressed my impression that the replication of *de injuria* to this plea did not require proof by the defendants of a formal by-law under the statute to establish the facts alleged. What they say respecting the state of the road was proved to be the fact, and all the other allegations were proved.

Then, as to the second count, it seems to be grounded on the same fact; but, instead of charging what the first count contains as done wrongfully, the second count, without imputing wrongfulness in raising the road, alleges negligence in the execution of the work. To this the defendants plead not guilty, thereby denying the breach of duty or wrongful act alleged. Now the breach of duty or wrongful act alleged is, that the defendants raised the street in a careless and negligent manner—that is to say, raised a solid line of road, without making any drains or culverts, or adopting any other sufficient means to carry off and away from the plaintiff's house the water which would otherwise flow, and did flow from the street, so raised, into his house and shop, &c., as it was their duty to have done. There was evidence of the want of precaution alleged, and of the consequences, and the jury found that the defendants had not constructed proper drains to carry off the water from the plaintiff's premises, for the want whereof the plaintiff was damaged. On this count and plea, therefore, the plaintiff seems entitled to a verdict,—*Farrell v. The Mayor, &c., of London* (12 U. C. Q. B. R., 343).

With respect to the question mainly argued, I entertain a strong impression that a by-law ought to have been passed to sanction the acts complained of. If what was done could be regarded as necessary to maintain and keep the road in proper repair, and therefore incumbent upon the defendants,

as a duty cast upon them by the statute 13 & 14 Vic., ch. 15, I have no doubt it could be justified without a by-law; but if the defendants possess no implied powers (*Kirk v. Nowell*, 1 T. R. 124), but must derive and trace all their powers from the statutes, and the facts do not make a case within the 13 & 14 Vic. ch. 15—and the 12th Vic. ch. 81, sec. 60, No. 1, and other sections formerly mentioned, only authorize the municipality to make by-laws for (among other things) raising any road or street, without in substantive terms conferring upon them power so to do—I am unable to point out where the legal authority for doing it exists, or whence it is derived. It is obvious that many acts, under by-laws, authorized by that subsection (60, No. 1,) must infringe upon private rights, and that others might infringe upon both public and private rights, and the legislature apparently intended that such steps should not be taken (otherwise than as positively enjoined by other statutes) without the deliberate and formal sanction and direction of the municipality, authorising it under a formal by-law, authenticated by the seal of the corporation. Loose proceedings without such observance, entailing injury either upon the public or individuals, were intended to be prevented.

Raising a long line of a public street in a town is not one of those oft-repeated little things, the frequency and exigencies of which supersede the necessity of formal proceedings; but when serious injury may be thereby inflicted on persons having property, and living in houses abutting on such street, it becomes a very grave matter, and the protection of both the public easement and the contiguous properties seems to demand that the powers conferred should be exercised in strict accordance with the statute, and I see no particular difficulty or inconvenience in conforming thereto. It is easy to pass a by-law authorizing the survey and improvement of any number of specified streets or portions thereof, or to pass such by-law, formed on previous surveys, plans and estimates therein referred to, and the omission may materially affect the responsibility of the municipality, its officers, servants or contractors in the execution of the work; for in my present impression, if that be done by the corpora-

tion without a by-law which no statute authorises or directs otherwise than through the medium of a by-law, and damage be occasioned to private individuals in respect of their property, I do not see how a court of law can hold it nevertheless justifiable, however great the damage may be. There is, no doubt, much force in the argument, that when treated as wrong-doers, in a civil action, by reason of something done to a highway, which a by-law might have authorised and directed to be done, and which being done, was a public improvement, and not a public nuisance, the want of a by-law will not make them wrong-doers, in having done informally what might, by the observance of due form, have been done lawfully.

The case of *The King v. The Commissioners of Sewers for Pagham, Sussex* (8 B. & C. 355), is relevant to this argument. In that case Bayley, J., said, if a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur, damage to himself, and a wrong committed by another; whence it would be contended, that though without formal authority, it was not wrongful to improve the street: wherefore an ingredient in the above proposition would be wanting. But, to test it, suppose that the informal proceedings resulted, as it possibly might, in creating a public nuisance to the highway or street, instead of a benefit, as well as a private injury, would the municipality be indictable, and if indictable, what defence could they set up, except the *bona fides* of their conduct, though informal, or in other words illegal, and if illegal, then wrongful, and both positions of the proposition would be established? I find in *Glover v. North Staffordshire Railway Company* (16 Q. B. 923), and in *Lawrence v. The Great Northern Railway Company* (16 Q. B., 643), another test, deemed in that and subsequent cases a satisfactory one—viz.: if what was done caused a damage to the plaintiff, by injuriously affecting his real estate, would the doing it, if the party had no special statutable power, give the owner of the land a right of action? To apply it, would the plaintiff, under the facts in this case have a right of action at common law against private individuals, public

officers, or the municipality, for so raising the street, &c., of their own spontaneous accord and discretion, without any special statutable power to do it—in other words, suppose no act of Parliament had passed, and that had been done which has been done here, would an action have been maintainable? That it would be maintainable against a wrong-doer, I think there can be no doubt—*Regina v. The Eastern Counties Railway Company* (2 Q. B. 347), *Lawrence v. The Great Northern Railway Company* (16 Q. B. 643, 654), *Glover v. The North Staffordshire Railway Company* (16 Q. B. 923), 15 *Law Times*, No. 633, 19th of May, 1855, 106–7, House of Lords; *Eastham v. The Blackburn Railway Company* (9 Ex. R. 761), *McKinnoh v. Penson* (8 Ex. R. 323), *The Inhabitants of the County of Cumberland v. the King, in Error* (3 B. & P. 354). It may be said that an act of Parliament did pass, which, irrespective of the special provisions in question, conferred general and comprehensive powers of local government, under which the municipality might act. Still it seems to me to leave the case just where it was; for if so, it is to be asked how are these powers of government to be exercised; and when the same act contains special provisions on this special subject, can it be contended that they are superseded, or may be disregarded, under other sweeping clauses that evidently do not embrace or contemplate them, and which, moreover, consistently therewith only confer the power to make by-laws for the attainment of any of the objects contemplated. Moreover, I still am disposed to think that in acting without a by-law the defendants incur liability under the facts alleged in the second count, though they might not have done so, had all they had authorized to be done been authorized and required in a by-law. I am further inclined to the opinion, that in reference to the first count they would be liable—if private individuals, doing of their own accord what the defendants did, would be liable, although it was a benefit to the road, as a public easement, and would not be indictable as a common nuisance, either as against the defendants or private volunteers. If the work was done under a by-law, based upon the survey and report of a scientific and

competent surveyor, such by-law, and the contract under it, prescribing what was to be done, having thus used due care to proceed correctly, and with as little injury to individuals as might be, I am at present disposed to think the case would come within the rule laid down in *Sutton v. Clark* (6 Taunt. 29) and that class of cases, and that the defendants would not be liable for defective arrangements in the work itself, nor for excesses in its execution, though injurious in their effects and consequences to the properties of adjacent landowners. Independently of all this, I may repeat what I observed during the argument, that if the defendants are within the statute (14 & 15 Vic. ch. 54), and had pleaded the general issue (per statute), they would have been entitled to notice of action; and the action (if otherwise maintainable) was probably outlawed; wherefore, on one or both of these grounds, they would have been entitled to a verdict under the general issue to both counts, if not generally upon all the issues. But the general issue is not so pleaded to either count, nor was the want of notice objected to, and I cannot find authority for holding the defendants entitled to the benefit of the objection, without pleading the general issue "per statute," or specially denying notice of action, &c., although it has been held otherwise, when the objection arises, on the facts proved in support of the plaintiff's case, and is not quite clear—See *Marsh v. Boulton* (4 U. C. R. 354). The 14 & 15 Vic. ch. 54, sec. 5, seems to contemplate its being done to let in the objection—*Shearwood v. Hay* (5 A. & E. 383), *Wedge v. Berkeley* (6 A. & E. 668), *Davey v. Warne* (14 M. & W. 199), *Wagstaffe v. Sharpe* (3 M. & W. 521), *Richards v. Easto* (15 M. & W. 244), *Hilliard v. Webster* (6 M. & G. 983), *Eastham v. The Blackburn Railway Company* (9 Ex. R. 758), *Arnold v. Hamel* (9 Ex. R. 404), *Davies v. The Mayor, &c. of Swansea* (8 Ex. R. 808, *Wadsworth*, 375), *White v. Clark* (10 U. C. Q. B. R. 490). The result is that the *postea* be delivered to the plaintiff, as to the second count; and as to the first, that the verdict be for the defendants on all the issues.

McLEAN, J.,—This cause came on to trial before me, at

Peterborough, in the spring of 1854, the declaration then containing the first count only; and at that time, on hearing the opening of the plaintiff's counsel, I was of opinion that the action could not be sustained; and the plaintiff, on my expressing that opinion, accepted a nonsuit. The court set aside that nonsuit and granted a new trial. I dissented from the judgment of the court on that occasion and gave my reasons, and though the matters involved in the suit have again been discussed before us, I have not been able to come to any other conclusion than that which I at first adopted. Since the new trial was ordered the plaintiff has added a count to his declaration, alleging that before and at the time of the committing of the last mentioned *grievances* the defendants were engaged in raising Hunter-street, opposite to his house and shop, several feet higher than the same had previously been, and thereupon that it became their duty *in raising* the said street to make a drain or culvert to carry off the water from the plaintiff's premises, which would otherwise flow from the street. In both counts the raising of the street is treated as a *wrongful* act on the part of the defendants; and yet in the second count it is alleged to have been *the duty* of the defendants, *as a corporation*, while doing *such wrongful act*, to do something else, in order that the water might not come on to plaintiff's premises. Now if the defendants' act of raising the street was *wrongful*, *no duty* would result from it, and the second count cannot be sustained. If *rightful*, then the first count is not sustainable.

I am of opinion that the plaintiff is not entitled to recover on either count. On the face of the declaration the plaintiff is proceeding for an act, as unlawful and wrongful, which the defendants have express authority by act of parliament, to do. He does not complain of the mode of doing the act, but of the act itself, as illegal; and the plea sets forth fully the authority of the defendants for doing that act; the finding of the jury virtually establishes that the defendants were not acting in discharge of their duty under the statute, in causing the street to be raised. The plaintiff admits, by bringing this action against them in their corporate character, that in doing what they did they were acting in that capacity.

The making of sewers is a power conferred on the several municipalities; but it must be left to them to judge of the necessity for such sewers, and to decide upon the time and manner of making them, and the expense to be incurred for that purpose. The plaintiff sues in this case, because the defendants did not, when doing a wrongful act, follow it up by doing another act within the scope of their authority, at such time as he considers they ought to have done it. Now the defendants were the persons to decide as to such time; they might not have estimated for the expense of sewers, and may not have had the means at their disposal at that particular time to construct the sewer which the plaintiff alleges it was their duty to make;—whether they had or not, they are not, as it appears to me from the grounds alleged in the declaration, liable to the payment of damages in this action at the suit of the plaintiff. I think, therefore, the verdict should be set aside and a nonsuit entered.

RICHARDS, J.—According to the finding of the jury, the judgment of the court, as to the first count, should be in favor of the defendants.

As to the second count, whether the municipality has or has not the power to grade or level the streets of the town without a by-law being first passed for that purpose, it seems to me the plaintiff is entitled to recover. The effect of that count is to charge the defendants with doing the act complained of negligently and improperly. The jury having found for the plaintiff, I think the verdict must stand. The case of *Farrell v. The Town Council of London* (12 U.C.Q.B.R. 343) seems to me to be in accordance with English decisions and to settle the question involved in the second count of the declaration in this cause.

But the more important and difficult question raised on the argument is—can municipal corporations in Upper Canada, in the absence of a by-law authorizing the act complained of, be sued in trespass or case by the party injured, when their servants, by their order, cause the injury in doing certain work that the corporation under the Upper Canada municipal corporations acts are empowered to make a by-law for the performance of?

By Provincial statute 12 Vic. ch. 81, sec. 60, it is provided "that the municipality of each village which shall be or remain incorporated under this act, shall, moreover, have power and authority to make by-laws for each or any of the following purposes, that is to say—*Seventhly*, for the opening, constructing, making, levelling, pitching, raising, lowering, gravelling, macadamizing, planking, paving, flagging, repairing, planting, improving, preserving, and maintaining any new or existing highway, road, street, &c., within the jurisdiction of the corporation of such village; and by section 80 the town council of any town shall have all such powers, duties and liabilities within, and in respect of such town as the municipality of any village shall have in respect of such village. If the acts complained of had been done by a private individual, and were not authorised by the corporation, then there is little doubt, I apprehend, but an action would lie against such individual for the damages suffered by the plaintiff.

It is therefore necessary to consider what is the effect of the words just quoted;—do they give the corporation power *to do the acts* pointed out, or do they confer on the corporation the authority to make *by-laws* to authorize those acts *to be done*. I think the latter is the proper interpretation to give to the words. In the first place, it is their literal meaning; in the next, it harmonizes with the general principles of law, with regard to acts to be done by such corporations—viz., that the corporation should authorize them to be done by a by-law of the governing body.

If the part of the section referred to were only directory, it would imply that the municipality had the inherent right to do the acts, and that the making of the by-law was only a means of declaring the will of the governing body of the corporation as to how the act should be done. The general doctrine is, that a municipal corporation created by act of parliament only possesses such powers as are conferred either by the act creating it or some other act of the legislature. As the power conferred by the statute on the subject of making, maintaining, draining, &c. roads, is that of making by-laws for those purposes, it seems to follow that it can only be properly conferred or used by or through a by-law.

Then can the defendants justify the act if the same were authorized by a resolution of the council; or, in other words, is a resolution of the council to be considered a by-law, *for the purposes now under consideration? I think not.* The 198th section provides that all by-laws made by any municipal corporation under the authority of that act "shall be authenticated by the seal of the corporation and by the signature of the head thereof, or of *the person presiding at the meeting at which the same shall have been made and passed*, and also by that of the clerk of such corporation;" and any copy written without erasure or interlineation, sealed with the seal of the corporation, and certified to be a true copy by the clerk, and by any member of the corporation for the time being, shall be deemed authentic and received as evidence in all courts in the province, without its being necessary to prove such seal or signature, unless it shall be specially alleged that the same are forged.

It may with much more force be contended that the former part of this section is merely directory, and that a by-law would be valid although wanting either the seal of the corporation, the signature of the clerk, or the certificate of the head of the corporation or the person presiding at the meeting at which it *was passed*, and that the mode referred to is only one of the modes of authenticating the by-law, which might be authenticated in some other manner. I do not think it would be safe to lay that down as a rule. The language of the clause is very explicit as to the mode of authenticating the by-law; and when it requires the signature of the head of the corporation or the signature of the person presiding at the meeting at which the *same was passed*, it seems to imply that authenticating of the by-law shall take place at or about the time of the passing thereof, and this authenticating is something different from merely verifying it, so that it may be received in evidence in courts of justice, the mode of doing which is also pointed out in the same section. I therefore come to the conclusion, that in order to justify the acts complained of in the declaration in this cause, even if all such acts can be justified, it is necessary that they should have been done under the authority of a by-law of the governing body of the corporation, such by-law being distinct from a mere

order or resolution, and to constitute a by-law it must be *authenticated* in the manner pointed out in the 198th section of the statute before quoted.

If the act complained of could be said to have arisen from the proper exercising of the power of maintaining and keeping in repair the highway, as the corporation are authorized and required to do pursuant to the statute 14 & 15 Vic. ch. 54, then of course they would not be liable in this action, as the injury would have arisen from the performance of a duty cast upon them by the legislature.

Judgment for the plaintiff on the second count, and for the defendants on the first count.

MCMURRAY ET AL. V. TALBOT.

Promissory note—Endorser.

Defendant having endorsed in blank, as security for the maker, a promissory note payable to plaintiff, but not negotiable—
Held, in an action against defendant, a maker, that he was not liable as a maker.

CASE specially reserved. Assumpsit by plaintiffs as payees against defendant as maker of a promissory note bearing date the 11th of October, 1854, made by defendant to plaintiffs, whereby ninety days after date, for value received, defendant promised to pay plaintiffs, at their office in Ingersoll, (not saying "or order") the sum of £85 15s.

It appeared in evidence that one A. D. Cameron was the maker of a promissory note such as that described in the declaration, for value—thus:—

"St. Mary's, 10th Oct., 1854.

"£85 15s.

"Ninety days after date, for value received, I promise to pay Messrs. Allen & McMurray, at their office in Ingersoll, the sum of £85 16s.

Signed, "A. D. CAMERON."

Which note was at the same time endorsed in blank by the defendant (signed Ralph S. Talbot) as a surety for the maker. It being intended that defendant should be bound as party to such note, the plaintiffs contended he was liable as a maker, and a verdict was found for plaintiffs subject to that point.

During last Easter term, *Hagarty, Q. C.*, obtained a rule calling on plaintiffs to shew cause why such verdict should not be set aside and a non-suit entered, pursuant to leave reserved.

Kirk shewed cause, referring to *Peto v. Reynolds*, 26 Eng. Law and Eq. Rep. 404.

Hagarty, in reply, cited *Byles on Bills*; *Wilcox v. Tinning & Hornby*, 7 U. C. Q. B. R. 372; *Gwinnell v. Herbert*, 5 A. & E. 436.

MCLELLAN, C. J., delivered the judgment of the court.

The cases in our own courts do not go to support this action, but none of them are identical.

Thew v. Adams (Hilary Term, 3 Vic.) was a promissory note made by Hearney payable to Thew or order, and endorsed by the defendant with the intention of becoming a surety to him; and it was held that the action did not lie against him either as endorser or maker in a declaration upon the common counts, to which a copy of the note was annexed, under the Provincial statute 5 W. IV. ch. 1, sec. 4, since repealed by the 3 Vic. ch. 8; *Jones v. Ashcroft* (Trinity Term, 4 & 5 Vic., 2 Cameron's Miscel. Cases, ch. 107), was also the case of a negotiable note, but the form of declaration is not stated in the report.

The case of *Gwinnell v. Herbert* (5 A. & E. 436) supports the decision of the Court of Queen's Bench of Upper Canada in the two last-mentioned cases.

West v. Bown (3 U. C. Q. B. R. 290) was apparently a negotiable promissory note, in which the defendant was sued by the payee as endorser, and on demurrer judgment was given for the defendant. In this case I said I could not find whether *Thew v. Adams* decided that a party endorsing his name on the back of a promissory note, or if so not endorsed by the payee, could be made responsible to the payee as a maker or endorser or guarantor.

In *Vandusen v. Vandusen* (7 U. C. Q. B. R. 175) the note was payable to plaintiff or bearer, and had been endorsed by the defendant in blank before its delivery to plaintiff by the maker; defendant was declared against as having, as bearer,

endorsed it to the plaintiff, and the action was sustained,—*Wilcox et al. v. Tinning & Hornby* (7 U. C. Q. B. R. 372), the note was made by Hornby to plaintiff or order, and endorsed by Tinning in blank, who was sued as a joint maker, and the action held not to lie. It was like the case of *Thew v. Adams*.

But recent cases in England shew that although such an endorser of a negotiable note cannot be sued as maker, still he may be made liable as an endorser to the payee;—*Burmester v. Hogarth* (11 M. & W. 97), *Smith v. Marsack* (6 C. B. 486), *Morris v. Walker* (15 Q. B. 589), conflict with *Thew v. Adams* and some others in our own courts; and these cases shew the desire of the three courts in England that the intention of the parties should not be frustrated, nor the intended surety be exonerated, if it can be avoided. The other cases, though not expressly in point, favor the present action.—*Russell v. Langstaff* (2 Doug 514). *Plimley v. Westley* (2 Bing. N. S. 249) was the case of a promissory note not negotiable, but endorsed to the payees and delivered to others, from whom defendant received it for value, and who delivered to plaintiff for value.

The plaintiff sued defendant on the note apparently as an endorser, and on the common counts, and the court held he was liable on the original consideration and was not entitled to notice of non-payment, and therefore not discharged, &c. *Tindal, C. J.*, however, said: "Had there been a second stamp, the defendant's endorsement might have operated as the making of a new note; but as it was a promissory note at first the stamp then affixed was exhausted, and the second transfer was a nullity for want of a second stamp." Here the defendant was not a party to the original transaction; nor did he endorse in respect of the same consideration for which the maker made the note; had it been all one transaction, one stamp might have sufficed. The case, at all events, suggests that a person endorsing a non-negotiable note may be liable as a maker.

In *Gwinnell v. Herbert* (5 A. & E. 436), the note was payable to G. or order, and the defendant endorsed it in blank, and being sued by the payee as a maker, the Court of Queen's Bench held the action did not lie. It was in argu-

ment distinguished from *Plimley v. Westley*;—and *Patteson, J.*, adverting to the difference, said: “The point in *Plimley v. Westley* was that the note not being on the face of it negotiable, the persons whose names appeared on the back were not endorsers, and might have been treated as makers if the instrument had been properly stamped, but that here the instrument was negotiable, so that the point discussed in *Plimley v. Westley* does arise.

If a negotiable note, endorsed by a stranger, it may be said, as the cases already cited shew, that the intention to endorse and to become liable only as an endorser can be fulfilled by a special mode of declaring, or by a replication, stating the special matter which entitles the payee to endorse above the other without consideration, and yet hold him liable as his endorser for value.

In such cases the intention is not frustrated, but effect given to it; while in a case like the present the defendant could not become a party or be made liable as an endorser to the plaintiff, and yet he did intend to become a party to the note and to be liable in some form. It may be said his obvious intention was only to become liable secondarily as an endorser or collaterally as a surety guaranteeing the note, as his act evinced. But it may be answered that he could not in law become so liable, wherefore the question is, which intention shall prevail—the primary or paramount intention to become a party to the note and liable to the payee therein, or the subordinate or secondary intention only to become so liable collaterally as an endorser, and not directly and consequently as a maker.—*Peto v. Reynolds* (9 Ex. R. 410).

If the note had been drawn payable to order, the late cases shew that the defendant might have been made liable to the plaintiff as an endorser to him for value, after the plaintiff had endorsed to the defendant without value. But the note is not negotiable on the face of it. The predominant intention, however, was that the defendant should become surety to the plaintiffs for the due payment of the note as an endorser, if by law he might; but, at all events, as a party to the instrument, if by law he could. The object of his name was not to transfer the note from himself to the plaintiff as an act of

endorsement in the ordinary course, either as a transaction of business or for his accommodation; but it was to become security to the plaintiffs for Cameron, the principal maker of the note. Treated as a joint and several maker, he might become such surety, and could become such, as a party to this note, in no other way; and as such maker he would retain all the rights of a surety to enforce contribution against his principal, Cameron, in full; so that his recourse against Cameron would not be abridged, though in a form different from that of an endorser. But he would, in that event, become directly and not collaterally liable, as he expected to have been.

Deeds are so construed as to operate according to the intention of the parties, if by law they may; and if they cannot in one form, they should operate in that which by law will effectuate the intention,—Broom's Maxims 288-9; and the courts should construe it so that it may be made to operate rather than be inefficient and fail in effect,—*ib.* 241.

I am therefore much disposed to think the defendant might be held liable as a maker. My learned brothers, however, are not disposed to take this view of the case; and without authority more express than any I have been able to find, I do not feel justified in expressing a dissentient opinion, supported as my learned brothers are by such weighty authorities, both in England and in our own courts. The intention, in fact, was to become liable as an endorser; and to hold the defendant liable as a joint maker would not be consistent with that intent.

The rule will, therefore, be absolute to enter a non-suit.

MCLAN, J., and RICHARDS, J., concurred.

McWHINNEY V. McQUAID.

Plaintiff sued on a bond. At the trial of the case the witness to the bond was not forthcoming, but notice to appear had been served on the defendant, under the statute 16 Vic. ch. 19; he not appearing, the learned judge who tried the case declined taking it *pro confesso* against him.

Held, that the whole case might have been taken *pro confesso*, and a verdict entered for the plaintiff.

This is a rule to set aside the non-suit in an action on a replevin bond, denied by the plea of *non est factum*.

At the trial the subscribing witness to the bond was not forthcoming, and the plaintiff could not prove it by him; but notice had been duly served by the plaintiff's attorney for the defendant to appear, under the statute 16 Vic. ch. 19, sec. 2. and he not appearing, the learned judge (*Burns, J.*) who tried the cause, was pressed to rule that it should be taken *pro confesso*. This, however, he declined.

Relief is now asked on the grounds—First, That it ought to have been taken *pro confesso*. Second, Upon affidavits of the absence of the witness, though subpoenaed.

The defendant filed affidavits in opposition.

MACAULAY, C. J., delivered the judgment of the court.

The case of *Whyman v. Garth* (8 Ex. R. 803) was cited by plaintiff's counsel as against the application on the first ground. It is not, however, quite in point. There the defendant was called as a witness to prove the deed, and there being a subscribing witness. See *Robertson v. Ross* (2 U. C. C. P. R. 193.)

Here he does not appear at all, and our act says such non-attendance shall be taken as an admission *pro confesso* against him, (unless otherwise ordered by the judge), and a general finding or judgment may be had against such party thereon. It may be said if defendant had appeared he could not have been examined as to the fact. It may be answered, that if he had appeared and voluntarily admitted the bond to be his at the trial, no final proof would be required. And here he in effect, by not appearing, makes default, and admits the bond.

Strictly, I think the whole case might have been taken *pro confesso*, and a verdict rendered for the plaintiff.

McLEAN, J., and RICHARDS, J., concurred.

DEADY V. GOODENOUGH.

Liability of broker—Warehouse receipts for flour—New trial.

Declaration in case. First count states, that the plaintiff was a miller, and the defendant a broker; that the plaintiff had 1000 barrels of flour in store at Port Credit, and retained defendant as broker to sell and deliver for him the 1000 barrels of flour, according to the contracts of sale, to such persons as should purchase, for commission and reward to the defendant in that behalf, which retainer he accepted; and afterwards, and in pursuance thereof, made a contract between the plaintiff and A.B. & Sons, whereby the plaintiff sold to them, and they purchased from the plaintiff the said flour at the price of, &c., to be delivered to the said A.B. & Sons, and to be paid for one-half in cash, and the balance with interest thereon by their note at sixty days; that after said contract, the plaintiff, in pursuance thereof, delivered to the defendant the said 1000 barrels of flour to be delivered by the defendant to the said A.B. & Sons on payment of the amount of the purchase money thereof by them to the defendant in manner before stated, and the defendant took upon himself the delivery according to contract; and thereupon it became and was the defendant's duty to use all reasonable care and diligence that the flour should not be delivered to the said A.B. & Sons without the price thereof being paid to the defendant according to the terms of the contract. Yet the defendant, not regarding, &c. did not use reasonable care and diligence that the said flour should not be delivered, &c. without the price being paid, but neglected and refused so to do, and so negligently and carelessly behaved in the premises that thereby the said flour was delivered to the said A.B. & Sons without the price being paid to the defendant by them or any other person, according to the terms of the contract, by reason whereof and of the said A.B. & Sons having become insolvent and unable to pay therefor, the plaintiff has lost and been deprived thereof, and of the price thereof.

Second count.—That the plaintiff, having in store at, &c. 1000 barrels of flour, retained the defendant (not charging him as a broker) to sell and deliver, &c. as in the first count, and setting out a sale thereof as in the first count, and alleging that it became the defendant's duty to use reasonable diligence and care that the purchaser was solvent, and that the defendant did not use diligence and care that the purchasers were solvent, but delivered the flour to A.B. & Sons, who were insolvent, whereby the plaintiff lost, &c.

Third count states that the defendant was a commission agent, and that the plaintiff delivered to him goods of large value, to wit, of the value of £2000, to be by him sold for the plaintiff for commission and reward, alleging his duty to use due care; and yet the defendant, not regarding, &c. sold said goods to the said A.B. & Sons, and delivered the same to them, and that by reason of the said A.B. & Sons being insolvent and unable to pay for the said goods, the plaintiff lost the same and the price thereof.

Fourth count—Trove.

Held, after verdict for the plaintiff, that when to the ordinary duties of a broker in a transaction, some special employment and undertaking is super-added by express contract, as laid in the declaration, the duty that arose resulted from such express contract, and not simply from the defendant's character of broker.

Held also, that the delivery of warehouse receipts for flour, and the delivery orders therefor is not a constructive delivery of possession of the flour.

Seemle, that when the merits have been tried and decided upon by a jury under informal pleadings, and the party is entitled to sustain his verdict on the amendment of such informal pleadings, the court will decline granting a new trial.

Writ issued February 27th, 1855. Declaration 10th April.

First count states that the plaintiff was a miller, &c., and the

defendant carried on the business of a broker in Toronto; that to wit, on the 2nd of December, 1854, the plaintiff was possessed of, and had in store at Port Credit, to wit, 1000 barrels of flour, and had then retained and employed the defendant as such broker, to sell for him, the plaintiff, the said 1000 barrels of flour, and to deliver the same according to the terms of the contract or contracts of sale to such persons as should become the purchaser or purchasers thereof for certain commission and reward to the defendant in that behalf, which retainer the defendant accepted; and afterwards, in pursuance thereof, made a contract between the plaintiff and certain persons trading under the firm of Joseph Helliwell & Sons, whereby the plaintiff sold to them, and they purchased from the plaintiff the said flour, at the price of forty shillings per barrel, to be delivered to the said Helliwell & Sons, and the amount of the purchase money to be paid at the rate aforesaid on delivery, one half in cash and the balance with interest thereon, by their note at sixty days; that after said contract, the plaintiff, in pursuance thereof, delivered to the defendant the said 1000 barrels of flour, so sold and contracted to be delivered to the said Helliwell & Sons, to be delivered by the defendant to them upon payment of the amount of the purchase money thereof by them to the defendant, in manner before stated; and the defendant then took upon himself the delivery of the said 1000 barrels of flour, according to the terms of the said contract, and it became and was his duty to use all reasonable care and diligence that the said flour should not be delivered to the said Helliwell & Sons without the price thereof being paid to the defendant, according to the terms of the said contract; yet the defendant, not regarding, &c., but intending, &c. did not nor would use reasonable care and diligence that the said 1000 barrels of flour should not be so delivered to the said Helliwell & Sons without the price thereof being paid to the defendant, &c., but neglected and refused so to do, and so negligently and carelessly behaved in the premises, that thereby the said flour afterwards, to wit, on, &c. was delivered to the said Helliwell & Sons without the price thereof being paid by them or any other person to the defendant, according

to the terms of the said contract ; by reason whereof, and the said Helliwell & Sons having become insolvent and unable to pay therefor, the plaintiff has lost and been deprived thereof, and of the price thereof.

Second count alleges that the plaintiff, having in store at Port Credit 1000 barrels of flour, and that he retained the defendant, &c. (not charging as a broker) to sell and deliver the same on the plaintiff's behalf, &c. as in the last count; then the plaintiff alleges delivery of the said flour in store at Port Credit to the defendant for the purpose aforesaid, whereupon it became his duty to use reasonable care and diligence that the purchasers thereof were solvent and able to pay for the same according to the terms of the contract of sale; and thereupon afterwards, to wit, on, &c. alleging a sale by the defendant to Helliwell & Sons on the same terms as in the first count, yet the defendant did not use diligence and care, &c., that the purchasers were solvent and able to pay, &c. but so carelessly, &c. that by reason thereof the defendant delivered the said flour to the said Helliwell & Sons, who were insolvent, &c. whereby the plaintiff lost the said flour and the price thereof.

Third count states that the defendant was a commission agent, and that the plaintiff delivered to him goods not enumerated, of great value, to wit, of the value of £2000, to be by him sold for the plaintiff for commission and reward, &c., then alleges his duty to use due care, &c. yet the defendant, not regarding, &c. sold the said goods to the said Helliwell & Sons, and delivered the same to them, and that by reason of the said Helliwell & Sons being insolvent and unable to pay for the said goods the plaintiff lost the same and the price thereof.

Fourth count—Trover.

Pleas—19th April 1855. First: Not guilty.

Second to first count: That the plaintiff did not retain or employ defendant as such broker as alleged, to sell or deliver the said flour to the purchaser or purchasers thereof (following the language of the declaration), nor did the defendant accept such retainer and employment for consideration or reward to him, in manner or form alleged: to the country.

Third to first count: That the defendant did not sell or dispose of the said flour or any part *modo et forma*, &c.: to the country.

Fourth : That the plaintiff did not deliver to the defendant, nor did the defendant take upon himself the delivery of the said flour *modo et forma*, &c. : to the country.

Third to second count—traverses the alleged retainer or employment *modo et forma*.

Sixth to second count—denies the sale of the flour as alleged, &c.

Seventh to second count—denies that the plaintiff delivered, or that the defendant took upon himself the delivery of the said flour as alleged, &c.

Eighth to third count—denies the retainer, &c., as alleged.

Ninth to third count—denies delivery or receipt of the goods as alleged, &c.

Tenth to third count—denies the sale of the goods as alleged, &c.

Eleventh to fourth count—Plaintiff not possessed, &c.

The plaintiff adds similiter, joining issue on all the pleas.

It appeared in evidence that the plaintiff held a warehouse receipt as follows :—

“Transfer warehouse receipt, 500 barrels.

“Credit Harbor, 1st December, 1854.

“No. 561.

“Received from William Deady, Esq., as per warehouse receipts, granted to himself, 500 barrels of flour, for storage, marked ‘Alpha Mills, Superfine,’ in apparent good order, now deposited in our warehouse, and subject to order; any accident by fire at risk of the owner.

Signed, “HENRY B. BOSTWICK, for C. H. Co.”

That on the 2nd of December, 1854, the plaintiff, who resides on the River Credit, several miles from Port Credit, was in the City of Toronto, and that on the same day a contract for the sale of 1000 barrels of flour from him to Joseph Helliwell & Sons, who dealt largely in flour in Toronto, was entered into. That the defendant, a flour broker in the said city, was instructed by the plaintiff to make sale thereof; and that the Helliwells wishing to purchase, the defendant introduced one of the firm of the plaintiff at his, the defendant's office, where the terms were arranged between the immediate principals, and in pursuance thereof the defendant made out and delivered to the plaintiff a sold note as follows :—

"No. 925.

"Toronto, December 2nd, 1854.

"Mr. Deady; I have this day sold for your account to J. Helliwell & Sons 1000 barrels, Alpha Mills' flour, at forty shillings guaranteed inspection No. 1., superfine. Terms, one half cash; balance, note sixty days; interest added.

"Your obedient servant,

"R. A. GOODENOUGH, Broker.

"\$8000; £2000. B. account one-half, £10."

That the plaintiff signed a delivery order, drawn in the handwriting of the defendant, as follows:—

"Henry B. Bostwick, Esq., Agent for Credit Harbor Co.

"Toronto, 2nd December, 1854.

"Deliver to the order of Jos. Helliwell & Sons, 500 barrels, my flour, charging shipper storage, &c."

Whether this order was made out and signed at the time of the sale, or whether it and the warehouse receipts were delivered to the vendees, Helliwell & Sons, or left with the defendant to abide the completion of the contract by payment on their parts, or retained by the plaintiff, was not distinctly proved. The plaintiff contended both papers were left with the defendant to be by him delivered to Helliwell & Sons, only upon their making the payments according to the contract, while the defendant contended the plaintiff delivered them to the vendees, and that he had not made himself responsible to see that the payments were made before he parted with them. However that may have been, it was in evidence that at that time Gooderham, Howland & Co. held a promissory note of the plaintiff's for four or five hundred pounds, coming due on the 12th of December, 1854; and that of the £1000 to be paid in cash for the flour, Helliwell & Sons were to pay the amount of this note to Gooderham & Co.; also, that at this time Helliwell & Sons were in good credit. It appeared that of the two flour vouchers one (the warehouse receipt) was delivered by Helliwell & Sons to Mr. Brown, a commission agent in Toronto, on the 5th, and the other (the delivery order) on the 7th December, the warehouse receipt being at the time endorsed by the plaintiff in blank, and the delivery order endorsed by Helliwell & Sons in blank, and both afterwards filled up by Brown in his own favour, and underneath such endorsements was written his own order for the

shipment of the flour on board the propeller 'St. Nicholas,' &c. on the 28th of December, though not so dated, and the flour was shipped accordingly on the 29th of December. It further appeared that on the 12th of December, 1854, the defendant sent a telegraphic message from Toronto to the plaintiff, as follows:—

"Money goes by Duggan in the morning, without fail. Six hundred to Howland & Co.

"R. A. GOODENOUGH.

That on the 13th of December, 1854, the defendant wrote a letter addressed to the plaintiff at Streetsville, as follows:—

"Toronto, 13th December, 1854.

"Mr. William Deady. Dear Sir,—I inclose herewith £400 less brokerage on the 1000 barrels, half £¹/₈ and note £1010 12s. 6d. Mr. Helliwell tells me he paid £600 to Messrs. G. H. & Co. Money matters continue tight, and everything dull. Yours truly

Signed, R. A. GOODENOUGH."

This letter was marked "money" and post marked at Toronto, the 13th of December; 4s. 9d. postage. It contained a promissory note signed Jos. Helliwell & Sons, dated Toronto, 13th Dec., 1854, promising to pay to the order of the plaintiff, sixty days after date, for value received, at the agency of the City Bank of Montreal here, (Toronto) £1010 12s. 6d. currency. It turned out that the Helliwells did not pay Gooderham & Co. the £600, but when the plaintiff became apprised of that fact did not appear. The Helliwells failed in a state of insolvency, in January, and left the country. The principal or active partner was examined as a witness on behalf of the defendant under a commission of interrogatories executed at Oswego, in the State of New York, on the 15th of May, 1855. It was further given in evidence on the plaintiff's part that it was usual in the flour trade to endorse such vouchers as the warehouse receipt and delivery order in blank, and for the buyer to fill in the directions to deliver when actual delivery was required; wherefore such papers passed from hand to hand in blank until filled up in full. That as a general rule the brokers make the contract, but do not deliver the goods; that defendant was a produce broker in extensive business in Toronto. That a broker's business

is to make contracts ; and delivery or payments are not his province ; that his duty as a broker ends with the bought and sold notes : that Helliwell & Sons were in good credit on the second of December, 1854, but their failure was known in January 1855 ; that the plaintiff's first enquiries of Gooderham & Co. were in January. Mr. Howland, of the firm of Gooderham & Co., being called as a witness for the plaintiff, said Thomas Helliwell, one of the firm of Helliwell & Co., came to him with reference to money transactions of the plaintiff's, seemingly in December, 1854, with reference to the plaintiff's note due on the 12th of December, already mentioned ; but Mr. Worts, another member of the firm of Gooderham & Co., was absent, and nothing seems to have been done ; he stated that both the plaintiff and Helliwell had accounts with them, *i.e.* (G. & Co.) and that he (Howland) trusted the Helliwells till near the end of December ; he would have delivered goods to them upon a cash sale, without receiving the money for four or five days. On cross-examination, he said the broker being intrusted with warehouse receipts and selling for half cash, and yet parting with the receipt, without receiving payment in cash, would be acting as a commission agent. Mr. Magrath, a practising barrister and attorney in this province, was also called by the plaintiff, and stated that on the seventh of February the plaintiff came to him about the 1000 barrels of flour, and that on the tenth he saw the defendant on the subject ; the Helliwells having failed before that, and the amount not paid to Gooderham & Howland : he related the conversation that ensued between himself and the defendant ; he said the defendant at first asked him how he came to call upon him, and was told that he came from the plaintiff, and that the defendant was cautious in his subsequent answers ; that the witness (Mr. Magrath) had with him the bought and sold note, the telegraph message and the letter : that for some time the defendant only said it was all right, and that he would see the plaintiff all right, and no necessity for any one to interfere, as he would see him all right, and had cautioned him to keep quiet and say nothing about it, and that he was wrong in telling the witness ; that being asked what he meant by seeing him all right, and whether he alluded to the whole

amount or to the balance of cash £600, he (defendant) said he did not think he ought to tell the witness anything about it, who replied he could do as he liked; that the defendant then said he would tell him; that being then asked how he came to sell to persons like Helliwell & Sons, who were in bad standing and reports about town respecting them, he said, "the little curse," meaning Thomas Helliwell, had promised him bills receivable in collateral security, but had not given them to him, but that he had a note for £1900 with William Helliwell's name on it, which was perfectly good; that being asked how he came to have that note, he at first hesitated, and being again asked how the plaintiff was to be made right, to set his mind at rest, or how much out of this £1900, defendant said "something like the figure of £400, or over that; that being asked, why not more, he said he must first pay a miller at Churchville (Ingram) £500; that being asked why he did not pay Duggan—an equal sufferer with the plaintiff, who had nothing to shew for it—the defendant said, on account of the £600 which was to be paid to Gooderham Howland & Co. and was not paid of the cash, meaning of the £1000 cash; that the defendant said his reason for preferring the plaintiff to Duggan was (as witness understood) that of the £1000 in cash the defendant was to pay Gooderham & Howland £600, and that in reference to that the defendant so spoke; that being asked when the £1900 note would be due, he declined telling; being asked where he would get the money, he would not tell, but said over and over again it was perfectly good, and that the impression on the witnesses' mind was, that the defendant got the note of Thomas Helliwell and was to pay Ingram £500 out of it, and dispose of the residue as he pleased; that witness had another conversation with him, the latter end of March, in King-street, when the defendant asked why he instigated the plaintiff to sue him, who replied that he hated to see people in law unless they had rights to be redressed; that the defendant said the plaintiff had sold the flour himself to Helliwell; that he had nothing to do with it, and would bet one to a hundred dollars that the plaintiff would never get a dollar; to which the witness replied he would, if he got his rights; upon which

the defendant said, "Well, I have £450 for him, and if he won't take it, I'll give it to some one else." Witness stated that the defendant did not deny making the sale at the first conversation. On cross-examination, the witness said he was the plaintiff's professional adviser at that time, and so far, the defendant said what he did under precaution; that he asked the witness if he came as a lawyer, who said he did, and explained as aforesaid.

Mr. Howland, being called as a witness for the plaintiff, among other things, said, the failure of the Helliwells was known some time in January, and that they did not pay him any money on account of the plaintiff, nor did the defendant after that date.

At the close of the plaintiff's case the defendant's counsel objected that there was no proof that the defendant had any custody of or control over the delivery orders, or was authorized to deliver the orders or flour.

The learned judge who tried the cause (*Macaulay, C. J. C. P.*) said he should leave it to the jury, though there was a doubt whether there was a sufficient evidence to go to the jury to shew that the defendant was empowered, intrusted with, and did deliver the warehouse receipt and delivery order to the Helliwells, and yet did so without receiving the cash. A commission was then opened, and the evidence of Thomas Helliwell read: in answer to interrogatories, he stated therein that he was a member of the firm of Helliwell & Sons; that he purchased 1000 barrels of flour from the plaintiff on the second of December, 1854, and the bargain was concluded at the defendant's office; that he was to pay forty shillings per barrel; that the terms of payment were, he was to hand immediately to the defendant to send to the plaintiff £400, and £600 he was to pay to Gooderham, Howland & Co. to the plaintiff's credit, on or about the 9th of that month, and the balance £1000, by promissory note, &c.; that the note was drawn at the time of the sale, at the defendant's office, but to whom delivered he did not remember; that upon his proposing to the defendant to purchase on part credit—defendant at once called the plaintiff in from an adjoining room, and put witness in communication with him, and the arrangement was

concluded with the plaintiff himself. In answer to the seventh question, whether he undertook and promised to the plaintiff to pay to his credit with Gooderham, Howland & Co. £600 on the ninth of December, 1854, as part of the purchase money of the flour, he answered, "I did." To the eighth: "Did the plaintiff accept your undertaking to pay this sum, and was the flour to be delivered to him on the faith of such undertaking?" He answered, "He did, and the flour was to be so delivered." To the ninth: That he was to pay immediately to the defendant, to be sent to the plaintiff, £400; £600 he was to pay to Gooderham, Howland & Co. on or about the 9th of December, and to give Helliwell & Sons' note for £1000 at 60 days, with interest; that the flour was to be delivered to the Helliwells immediately, being at Port Credit; that he paid the £400 to the defendant within a day or two after the purchase; that the note for £1000 was also made to plaintiff's order at the same time with the purchase of the flour, and was delivered, but whether to the plaintiff or the defendant he did not remember; that the £600 to Gooderham, Howland & Co. never was paid; that the plaintiff did not object but consented that witness should receive the flour before the whole purchase money was paid, and the entire transaction of the purchase of the flour was with the plaintiff's assent and made with him. To the last general question, he answered that within a day or two after the purchase, and before he had paid the £400 to the defendant, the defendant showed him a telegraphic communication or letter, he thought the first, purporting to be from the plaintiff, saying that unless he, the plaintiff, received the £400 by the following mail he should repudiate the bargain, or to that effect; that witness got the £400 immediately and paid to the defendant, to be sent to the plaintiff. To the cross interrogatories he answered, that his first communication was with the defendant, but his final one respecting the purchase of the flour was with the plaintiff; that the bargain was not made with the defendant, nor completed through him, except that the witness received from him, signed by him, the usual broker's note, &c. He repeated again and again the terms of the contract: he said, among other things, that he could not say whether he got warehouse receipts or an order

for the flour, or both—nor could he say from whom he got either or both of such receipts or order; that he obtained possession of the flour either on an order or warehouse receipt, or both, and did not remember which; that he would not say whether the £400 was paid to the defendant before or after the delivery of the flour; that himself and partners were, at and for a short time previous to this purchase, in embarrassed circumstances, and found it difficult to raise money to meet their obligations; but the defendant had no knowledge or suspicion of the fact to witnesses' knowledge, and to his belief supposed them, at the time, entirely solvent, giving as his reason that the defendant had frequently sold them flour previously at market prices, and generally wholly or in part on credit; that he was not to furnish collateral security for the portion of the price of the flour for which credit was to be given, or for any part of it; that the defendant had never required it in former transactions, nor had they ever given it.

The defendant also proved that the plaintiff was in Toronto, and at the millers' association rooms, which were on the same floor as the defendant's office, &c., the 2nd and 9th December, 1854; and Mr. Fiskin, of the firm of Ross, Mitchell & Co. said they had transactions with the Helliwells after the second of December; that he did not consider them very strong, but good to a limited extent; and that he would have sold them 1000 barrels of flour taking their paper for it.

The learned judge told the jury he saw no ground of action for negligence in selling to the Helliwells on the grounds of their being insolvent in fact and within the defendant's knowledge, or that he had not sold to them under facts and circumstances, a knowledge of which he, with due diligence, ought to have attained. That it turned upon the demand for the £600 as to which, what was the fact? Did the plaintiff intrust the defendant with the warehouse receipts and delivery order with power to deliver the flour, or did the plaintiff deliver them himself, or if not, did he sanction or afterwards approve of its having been done without payment of the £600 to Gooderham, Howland & Co.? Did the plaintiff agree that the Helliwells should pay £600 to Gooderham, Howland & Co.; and if so, did

he require the defendant to hold the flour vouchers till he was paid cash? or was the defendant bound to receive the £400, and to see that the £600 was paid before he parted with them as he did, or did he violate the plaintiff's instructions or authority, or did the plaintiff acquiesce in or approve afterwards of what he had done? Having gone through the case at some length, and calling the attention of the jury to the propriety of contrasting the plaintiff's evidence with the defendant's, he left it with them. They found for the plaintiff, £600 damages.

In the following term (Easter Term, 18 Vic., June 1855), *C. Robinson*, for the defendant, obtained a rule on the plaintiff to shew cause why such verdict should not be set aside, and a new trial be had, on the ground that it was contrary to law and evidence, and for misdirection.

Vankoughnet, *Q. C.*, shewed cause the same term, and contended that no legal question arose; he referred to Helliwell's evidence read on the defence, and submitted that it was a clear case of breach of duty on the defendant's part, intrusted as he was with the documents, which represented and authorized the delivery of the flour, and in effect gave him the control of the flour.

Hagarty, *Q. C.*, in reply, referred to *Boorman v. Brown*, 3 Q. B. 511; *Kemble v. Atkins*, Holt N. P. C. 437; *Mitford v. Hughes*, 10 Jurist, 990; *Story on Agency* S. 28; *Thom v. Bigland*, 8 Ex. R. 730; and contended that the defendant acted gratuitously in relation to all, after the contract of sale was concluded, when his business as a broker, and for which also he received reward, ended; that it was not proved that the vouchers were intrusted to him, and if they were that they were not like promissory notes, and passed in themselves no property in the flour to the Helliwells; that the Helliwells acquired the right of property in the flour by virtue of the sale, and the papers only authorized the warehouseman to deliver it and affected only the bare possession; that no property in the flour vested in the Helliwells until the payments were made; whereupon, if the delivery orders were handed in too soon, they imparted no right of property and were simply void,

Robinson, on the same side, relied upon the variance

objected to between the declaration and evidence under the pleadings, on the ground of the superadded obligation not proved, and also on the ground of variance, the delivery orders if received by the defendant not constituting delivery or possession of the flour as alleged—*Wilkinson v. Martin*, 8 C. & P. 1; *Burnett v. Bouch*, 9 C. & P. 620; *Baring v. Corrie*, 2 B. & A. 127; *Chitty on Contracts*, 135; *Russell on Factors and Brokers*, 341-3, for the law; *Steven's Lectures on Brokers*, &c.

As to the second and third counts, they were not supported in evidence; and as to them therefore the defendant was entitled to a verdict; it depends upon the sufficiency of the evidence to support the first count under the issues joined.

MACAULAY, C. J.—As to the distinction between the strict duties of a broker and the duties alleged to have been undertaken by the defendant in the first count of the declaration, and to establish which evidence was offered at the trial, the case of *Boorman v. Brown* (3 Q. B. 511) is an authority to shew that where something is superadded by express contract to the ordinary duties of a broker, the duty arises from the contract, and does not arise simply from the defendant's character of broker; and that was an action on the case like the present. So nothing turns upon the abstract duties of a broker; but it depends upon the special employment and undertaking superadded to or engrafted upon the plaintiff's employment of the defendant as such broker—*Courtenay v. Earle* (10 C. B. 73). Secondly—I think the employment and undertaking, as proved (not by direct but by circumstantial evidence), varies materially from that laid in the declaration. The declaration alleges that the plaintiff retained and employed the defendant as such broker, to sell for him, the plaintiff, 1000 barrels of flour, and to deliver the same according to the terms of the contract of sale, &c.; and that after the defendant had negotiated a sale, the plaintiff delivered to the defendant the said 1000 barrels of flour, to be delivered by him to the vendees upon payment as agreed upon—viz: one half in cash and the balance with interest by the vendees' note at sixty days. The second plea denies the

alleged employment to sell or deliver the said flour, &c.; the fourth denies that the plaintiff delivered or that the defendant took upon himself the delivery of the said flour as alleged. The first denies that the defendant was guilty of wrongfully delivering it to the Helliwells. The declaration and evidence, so far as it went, shew that the flour was in fact in the possession of the plaintiff at a warehouse in Port Credit, and never was delivered to or in the possession of the defendant. In *Boorman v. Brown* (3 Q. B. 511) it is expressly alleged that the oil was consigned to the defendant; it therefore came to his possession before he delivered it. It was not proved here that the flour ever came to the defendant's possession, or that he made delivery thereof. The evidence went to shew that the warehouse receipts and delivery of the orders were intrusted with the defendant to be delivered upon payment by the vendees as agreed upon; but the delivery of such instruments was not a constructive delivery of possession of the flour itself, either to the defendant when he received them, or by him when he parted with them. They do not pass the property in goods like bills of lading, at all events until presented and acted upon. The warehouse receipts acknowledged the possession by the warehouseman as bailee, and the order authorized him to deliver the flour therein mentioned. The cases seems clear on this head—*Akerman v. Humphrey* (1 C. & P. 53); *Morton's Vendors*, 257; *Tucker v. Ruston* (2 C. & P. 86); *Elmore v. Stone* (1 Taunt 460); *Ridout v. Alder* (1 Mont. 103); *Exparte Davenport* (1 D. & C. 397); *Lewis v. Dorrien* (7 Taunt. 278); *Harmer v. Anderson* (2 Camp. 243); *Spear v. Travers* (4 C. 251); *Greening v. Clark* (4 B. & C. 316); *Wilkinson v. Reay* (1 Dan & Lloyd, 200); *Greaves v. Hepkie* (2 B. & Al. 131); *Busk v. Davis* (2 M. & S. 397); *Lackington v. Atherton* (7 M. & S. 360).

The delivery of orders may effect a transfer of the right of property and place it thenceforward at the risk of the vendee; but till presented, notified to, or acted upon by the warehouseman, they do not amount to actual delivery or possession of the goods; consequently the delivery of the papers by the plaintiff to the defendant did not constitute a delivery of the flour to him, nor did his delivery of them to the vendees con-

stitute a delivery to them (unless constructively)—*Lackington v. Atherton* (7 M. & G. 360)—although they enabled them to demand delivery of the warehouseman, or to transfer the right to receive possession (as they did) to another, to whom the flour was delivered. It did not appear whether the flour in question was the separate and distinct property of the plaintiff, or only part of a large quantity warehoused in his name: in other words, whether the flour sold was capable of being identified and distinguished from all other flour that might have been in the warehouse. At the trial, it was treated as a sale of a specific 1000 barrels—*Busk v. Davis* (2 M. & S. 397); *Hawes v. Watson* (2 B. & C. 540). It appears to me that, to meet the evidence, the declaration should have alleged, according to the fact, that the plaintiff delivered the warehouse receipt and delivery order to the defendant, to be delivered to the vendees on receiving payment as per agreement, and yet that he wrongfully delivered over the same without receiving such payment, whereby the vendees or their assignees obtained possession of the flour. I cannot say that such dealing with the vouchers constituted proof of the receipt and delivery of the flour itself as alleged.—*Bartlett v. Holmes* (13 C. B. 630, S. C. 17 Ju. 888); *McEwan v. Smith* (13 Ju. 265).

The declaration also states that one half of the price was to be paid in cash. The evidence was that it was to be partly paid to Gooderham, Howland & Co., and the residue to the plaintiff, or to the defendant for him. The breach is, delivery of the flour without payment of the price to the defendant, as if all was to have been made to him directly; one half was to have been paid in cash, though not all to the defendant. At the trial, however, I thought that if intrusted with the delivery orders it was incumbent upon him to see that the man he did not himself receive was paid to Gooderham, Howland & Co.; the fact of which he might have satisfied himself upon, by demanding of the vendees, for the plaintiff, the plaintiff's note to Gooderham, Howland & Co., which they were to return.

3. I think there was sufficient proof that the defendant did sell the flour to the Helliwells, although the plaintiff personally intervened during the negotiations. The defendant's sold

note shews this; and as to an objection raised that the defendant ceased to be acting as broker when he introduced the plaintiff to the Helliwells, and referred them to him, it makes no difference in my opinion; the defendant commenced and concluded the sale as such broker and was entitled to and received brokerage fees accordingly.—*Wilkinson v. Martin* (8 C. & P. 1); *Burnett v. Boush* (9 C. & P. 620); *Thom v. Bigland* (8 Ex. R. 730.)

4. As to the evidence, I still think there was sufficient to go to the jury, fairly to warrant the inference that the plaintiff had left the vouchers with the defendant to be delivered to the Helliwells on receiving payments as agreed upon, and that he parted with or delivered them to the Helliwells prematurely. Without recapitulating the evidence, I think it went to establish (as the reasonable inference) that the defendant was placed in possession of these papers by the plaintiff, and that he afterwards parted with them without receiving payment of any part of the £1000 to be paid in cash, or if he did, without acknowledging it, or remitting any part of it to the plaintiff for several days afterwards. There was no proof that he actually received more than £400; it was proved the Helliwells did not pay the £600 to Gooderham, Howland & Co., as the defendant said they told him they had done, and it is evident the defendant did not adopt obvious precautions to be assured of that fact. He was strictly only authorized to take the plaintiff's note to Gooderham, Howland & Co. as, or in lieu of so much cash; he did not do this, but according to his own account relied upon a verbal misrepresentation of the fact by one of the vendees. It looks as if the defendant had incautiously favored the Helliwells to the damage of the plaintiff. If therefore the evidence supported the declaration, I should have been satisfied with the verdict on the merits—*Kemble v. Atkins*, in notes Holt, N. P. C. 437.

August 27th, 1855. Having read the above this day, *Vankoughnet, Q. C.*, counsel for the plaintiff, remarked that the objection of variance was not taken at the trial, and that if it had been he might have moved to amend under the Provincial statute 7 W. IV. ch. 8, sec. 15. The case was then deferred for explanation on this head; and on Saturday the

1st of September, *Hagarty, Q. C.*, for the defendant, stated that at the close of the plaintiff's case he did object that the evidence did not support the declaration (which alleges the delivery of the flour, and not of the delivery orders), and that he only went into evidence on the defence in consequence of such objection being overruled, but meaning to contend broadly that the declaration was not supported in proof, and that even if the delivery orders were received by and parted with by the defendant, as the plaintiff endeavored to shew, it would not help the case, such orders not transferring the property, nor constituting a constructive delivery or possession of the flour.

At the trial there was no proof of the actual delivery of the flour itself, and the plaintiff's evidence merely went to shew that the delivery papers had been intrusted to, and improperly parted with by the defendant; and the assumption that, as they gave the holder control over and the right to demand the flour, their possession amounted to a constructive or virtual possession of the flour itself; and although the defendant's counsel, no doubt, did object to the sufficiency of the proof, I took such objection to be that the plaintiff had failed to prove that the defendant had undertaken anything beyond his own duty as a broker, or that the delivery orders had been in fact intrusted to him, or had passed through his hands to the Helliwells, and not that their delivery to the defendant, &c. if proved, did not suffice; or that, assuming their delivery, the declaration would be nevertheless unsupported on the ground of variance in the proof (*viz*: the delivery papers), from the allegation in the declaration, *viz*: the delivery of the flour; and my attention throughout the plaintiff's case having been drawn to the question of the delivery orders, which appeared to me to be treated as the gist of the enquiry, I did not perceive, if intended, that the defendant's counsel meant to object to a variance between the evidence and the declaration on this point, by the plaintiff's own shewing, in addition, the objection which was made—and as I took it to be—that the evidence was insufficient to prove the defendant's alleged superadded duty or undertaking in relation to the sale, and the possession by him of the delivery orders, I have the impression that at one stage of the proceedings I looked to the

pleadings to see whether the alleged delivery and receipt of the flour had been traversed ; but still I did not understand (so far as I can recollect, or as my notes shew) that it was meant to be contended that if obligations beyond the defendant's bare duty of a flour broker could be superadded by special contract, or be proved on this declaration, framed as it was, and if the custody of the delivery orders by him was proved, still that there was a variance on the ground that delivery and possession of such orders did not constitute delivery and possession of the flour as alleged. I took it to be objected that the declaration was not supported—not because of such a variance, but because an action would not lie for anything beyond the defendant's duties as a broker strictly, and because no additional undertaking in relation to the completion of the sale was proved in fact. It may have been urged to the jury that the orders did not by mere delivery transfer the property in the flour, and therefore did not confer a title on the holder, but left the right of property still remaining in the vendor ; but I have no distinct recollection of such a question, as one of law, being raised or pressed upon the court at the trial. My impression was that they entitled the holder to demand delivery of the flour, and therefore imported a sale and gave the holder the control over the delivery and possession, at all events till revoked or countermanded by the vendor ; and it was proved that they had had such effect upon the possession of the flour itself, which was delivered under their authority to the assignees of the Helliwells. Had the defendant's counsel stopped and rested upon the objection made at the close of the plaintiff's case, it might be said he had objected to the proof in toto as insufficient to prove the declaration, or to support this or any other action ; but he went on and gave evidence in support of the defence, and my note shews how I was impressed with the objection raised. It is thus : "At the close of the plaintiff's case the defendant's counsel objected that there was no proof that the defendant had any custody of, or control over the delivery orders, or was authorized to deliver the orders or flour,"—pointing to the insufficiency of the evidence to prove the super-added obligation alleged without distinguishing between the

possession of the papers as being different from the possession of the flour, and a variance therefor in the proof. It no doubt was intended to object to the sufficiency of the evidence to support the action—the difficulty is on what grounds such objection was rested. I said I would leave it to the jury, though there was doubt whether the evidence was sufficient to shew that the defendant was empowered, intrusted with, and did deliver the warehouse receipt and delivery order to the Helliwells without receiving the cash, &c.; and at the close of the case, I left it to the jury as turning upon such fact, not that I meant advisedly to rule that the delivery orders and the flour were identical, and the possession and delivery of the one equivalent to and proof of the possession and delivery of the other. I did not see the force of the objection; and if this view was intended to be presented to my mind, my note shews the impressions under which I acted. The effect of the course pursued was, that the merits upon which the case must in point of fact be disposed of were fully discussed and left to the jury. There was no pretence for saying the defendant had either received or delivered possession of the flour any further than as he might have received possession of, and have delivered over the delivery papers, through which actual possession of the flour was obtained, and I regarded his connection with and his conduct in relation to such papers as the gist of the investigation; and it was discussed and left to the jury accordingly.—*Palmer v. The Grand Junction R. W. Co.* (4 M. & W. 749.)

It may be that an amended declaration would so far affect the present pleas and issues as to entitle the defendant to plead *de novo*, and I am disposed to think so; wherefore an amendment at the trial would probably have rendered a postponement of the trial for a few days necessary to admit of such amendment, unless the facts could have been specially found and endorsed on the record under the statute 7 Wm. IV. ch. 3, sec. 16. Had the objection of variance been clearly made, distinctly from the other objections that were raised, the case might have taken a different turn at *Nisi Prius*; but there seems to have been a misapprehension. It may therefore be proper to grant a new trial. Upon an amended

declaration, I still think the evidence sufficient to go to the jury in support of the action, though not on the declaration as framed; and there are cases to shew that where the merits have been tried and decided upon by a jury under informal pleadings, and the plaintiff is entitled to sustain the action upon an amended count, the courts will decline a new trial—such as *Forest v. Douglas* (1 H. B. 241); *Mayfield v. Wadswley* (3 B. & C. 357); *Oxley v. James* (13 M. & W. 215); *Dyer v. Cowley* (12 Ju. 777). Other cases sanction new trials where an important point of law or a statute has been inadvertently overlooked at the trial.—*Sutton v. Mitchell* (1 T. R. 20); *Ex parte Thorold in re Thorold* (7 Jurist 309.)

Upon the whole, considering the large amount at stake, the novelty and intricacy of some of the points involved, the apparent misapprehension on one of them, the undoubted variance that does exist, and the sufficiency therefor of the objection broadly taken that the evidence did not support the plaintiff's case as the pleadings stand, we think the rule should be made absolute for a new trial; but the merits having been discussed and pronounced upon as explained, and the granting of a new trial under such circumstances being a matter of discretion, we think it ought to be upon the terms of payment of costs, and with leave to the plaintiff to amend his declaration by adding another count or by altering the present count as he may be advised, with leave to the defendant to plead to such amended declaration within the time limited by the practice for pleading to amended declaration, but upon his undertaking to plead issuably and to accept short notice of trial for the next assizes, if necessary.

Rule absolute on payment of costs.

FULTON v. JAMES.

Horse race.

A trotting match for fifty pounds, between two horses driven in harness in sleighs on the ice, is a legal horse-race, within the statutes 13 Geo. II. ch. 19, and 18 Geo. II. ch. 34.

This is an action for money had and received to recover fifty pounds, deposited by plaintiff with defendant, as a

stakeholder, upon a bet upon a trotting race or match in harness with a sleigh drawn by each horse, upon the ice of the Burlington Bay last winter, the race being between the horse of the plaintiff and that of one Dougherty, on the ground that the race was illegal, and within the gaming statutes, and that the defendant had notice thereof before paying over the stakes to the said Dougherty, whose horse was declared to be the winner, which fact however the plaintiff denied to have been legally determined according to the terms of the race.

The main point made at the argument to enter a verdict for the plaintiff for the fifty pounds was, that the race was a gaming transaction, illegal and void, and not a horse-race within the statutes excepting certain races from the operation of the gaming acts.

Read, for plaintiff, and *M. C. Cameron*, for defendant.

The following cases were referred to on the argument—*Evans v. Pratt*, 3 M. & G. 759; *Hastelow v. Jackson*, 8 B. & C. 221; *Ximenes v. Jacques*, 6 T. R. 499; *Whaley v. Pajot*, 2 B. & P. 51; *Sheldon v. Law*, 3 O. S. 85; *Statutes*, 9 Anne c. 14; 16 Car. II. c. 9; 13 Geo. II. c. 19; 18 Geo. II. c. 34; *Elton v. Kingsman*, 1 B. & Cel. 683; *Marryat v. Broderick*, 2 M. & W. 369; *Applegarth v. Colley*, 10 M. & W. 723; *Thorpe v. Coleman*, 1 C. B. 990; *Batty v. Marrott*, 5 C. & B. 826; *Challand v. Bray*, 1 Dow. N. S. 791; *Emery v. Richards*, 14 M. & W. 728; *Evans v. Pratt*, 4 Scott, N. R. 578; *Bentinck v. Connop*, 5 Q. B. 693.

MACAULAY, C. J., delivered the judgment of the court.

The statute 16 Car. II. c. 9 has been held not to apply to all gaming, but to such only as is fraudulent or excessive; it does not seem therefore to govern this case—*Applegarth v. Colley* (10 M. & W. 723.)

The 13 Geo. II. ch. 19, and 18 Geo. II. ch. 34, sec. 11, are considered as legalizing horse-racing at any place; the former requires the horses to be entered by the owners and the stakes to equal fifty pounds, both of which facts concur in the present case.

The case of *Evans v. Pratt* (3 M. & G. 759) decides that “any place” is not restricted to regular courses or established

places for racing; and if this was in other respects a legal race, I do not think the statute of 9 Anne ch. 14 applies. The last case shews that the first section does not, nor does the fifth, on the grounds upon which both the above cases were decided in reference to that act, and the statute 16 Car. II. ch. 9.

It was not a fraudulent or excessive gaming, nor was it a case in which the plaintiff's opponent in the race did by fraud or slight, cozenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in bearing part in the stakes, wager or adventure. win above the sum of ten pounds; nor is the action against him either for penalties or for the money won.

If it was a horse-race, it was decided both by the referees and the jury that the other horse won the race, and the money was not demanded back by the plaintiff from the defendant until after such race had been run and lost by him.

Tindal, C. J., in *Evans v. Pratt*, said "a horse-race is properly when the speed of one horse is matched against the speed of another horse." Here, as then, it was a trial of the strength and speed and vigour of the two horses; and I cannot find that a race between two horses driven in sleighs on the ice is not a horse-race just as much as it would be if the two drivers had ridden upon the horses, either in saddles or or bareback, over the same course.

None of the cases that I have seen appear to me to shew that it was not a horse-race, though called a trotting match in sleighs, and the horses were driven, not ridden. *Challand v. Bray* (1 Dow. N. S. 791) was a trotting match, though seemingly both horses ridden with saddles; and considering that the plaintiff took his chance of winning before he sought to rescind the contract, and did not demand back his deposit until after he had lost the race, I do not think he can maintain this action as for an illegal transaction void at law.

Per Cur.—Rule discharged.

ROSS ET AL. V. WINANS ET AL.

Bills of Exchange—Collateral security—Merger—Damages on protested bills.

To a declaration containing five counts on five different bills in assumpsit, against the defendant as maker of certain bills of exchange, the defendant pleaded that after the bill in the first count mentioned became payable and while those mentioned in the other counts were running, it was agreed that the defendant should execute a mortgage of certain lands to secure payment of all the bills of exchange in the declaration mentioned, and that twelve months from the date of said indenture should be given to the defendant for payment of the same and all interest, damages &c. by reason of the nonpayment of the same; then sets out the indenture of mortgage, whereby, after reciting that the defendant W. had drawn bills of exchange, amounting to &c., drawn upon and accepted by the defendant P. for their accommodation, payable in London, and of which a portion was overdue and unpaid, which bills were endorsed by the defendant W. to the plaintiffs, that the defendant, being unable to provide funds to pay said bills, had agreed to make this security to M. (one of the plaintiffs) to secure them against all loss, damage, &c. which might accrue to them by reason of the nonpayment of the said bill; in consideration of the premises and five shillings, defendant W. conveyed to M. (one of the plaintiffs) certain leasehold property, to hold for residue of term &c., subject to a proviso, that if said W. should well and truly retire the said bills and pay or cause to be paid, unto the said firm of the plaintiffs, or to the parties legally entitled to the same, all sums of money, damages, &c., by reason of the said bills and the nonpayment thereof, or of any or either of them, or any part thereof, within twelve months from the date of said indenture; and if he shall then well and truly indemnify and save harmless the said plaintiffs of and from all payments, damages, and expenses by reason of the premises, then to be void &c.; containing also a covenant by said defendant W. to perform &c. the covenants &c. in the said proviso, and also a proviso for said W. to retain possession of the premises until default &c.

Held, that such mortgage was only to be taken as a collateral security for the due payment of the bills, and not as a substituted or independent security; that there was no merger; and that the right of the plaintiffs to sue upon the bills before the expiration of the twelve months was not restricted by such mortgage.

Held also, that where a bill of exchange is drawn in Upper Canada addressed to a person residing in Upper Canada, and payable in England, ten per cent. upon the amount of such bill can be collected under the statute 13 Vic. ch. 76.

WRIT, 26th of March 1855. Declaration, 10th of April 1855.

First count states that the defendant Winans, by the name of Mackechnie and Winans, on the 8th of August 1854, at the town of Cobourg in Upper Canada, drew a bill of exchange directed to the defendant Poore, requiring him to pay to the order of the drawers, at the Union Bank of London, in London, to wit, the City of London in England, £1500 sterling four months after date, which had elapsed; that Poore accepted the same; that the defendant Winans afterwards endorsed it to the plaintiffs, and that Poore did not pay the

same, although it was duly presented for payment on the day when it became due, of all which said Winans had notice.

Second count is on a similar bill, drawn on the 21st of October for £500 sterling, at three months after date.

Third count, on another bill, dated 29th of September 1854, for £750 sterling, at four months. Fourth count the same, dated 21st of October 1854, for £700 11s. 3d. sterling, at four months. Fifth count the same, dated 21st of October 1854, for £697 4s. 5d. sterling; at five months.

Pleas.—First, by the defendant Winans—As to £450 in first count mentioned, the sale and transfer of certain stock in satisfaction.

Second, by Winans to the whole declaration—That after the bill in the first count mentioned became payable, and while those mentioned in the second (*qu. third*), fourth and fifth counts were running, it was agreed between Winans and the plaintiffs that Winans should execute the mortgage therein mentioned—(and dated the 2nd January 1855, and which is therein recited) of certain lands mentioned, naming them &c., to secure payment of all the bills of exchange in the declaration mentioned, and that a certain time—that is to say, twelve months from the date of said indenture (not then elapsed)—should be given to the defendant Winans for payment of the same and the interest thereon, and all damages and expenses by reason of the nonpayment thereof. And then alleges that the indenture was made &c., stating its terms and Winans' covenant; concluding with a verification.

Third plea, by Poore to the whole declaration—That the bills were accepted by him for the accommodation of Winans and without value, as plaintiffs knew; that after the first bill became due and while the others were running, it was agreed between Winans and the plaintiffs, stating the indenture of the 2nd January 1855, and alleging the agreement to give time in terms similar to the last plea, and then concluding with a verification.

Fourth plea, by Poore as to £450 part &c. in first count &c.—The sale and transfer of stock by Winans in satisfaction &c., as in first plea by Winans.

Replication (separately), to the first and fourth pleas,

traverses the alleged satisfaction in stock,—and issue. Separately to second and third pleas—that it was not agreed by and between the defendant Winans and the plaintiffs that the time in the said second and third pleas (respectively) mentioned, or certain time, should be given to the defendant Winans for payment of the bills of exchange in those pleas (severally) mentioned, or the interest thereon, or any part thereof, or all or any part of the damages and expenses by reason of the nonpayment thereof, in manner and form alleged; to the country, and issue.

Thus making the legal construction of the indenture the substance of the issue, for it is not denied in fact, and the defendants rely upon it as stated, as sustaining the allegation that time was given. If it raised an issue of fact for the jury, the verdict is for the plaintiffs.

At the trial the several bills of exchange were put in, corresponding with those declared on, and the indenture was duly proved. The indenture, dated the 2nd January 1855, between Winans, one of the defendants, and Mitchell, one of the plaintiffs, recites:

“That Winans and Mackechnie drew bills of exchange on England, amounting to £3750, drawn upon and accepted by Poore for their accommodation, payable in London, and of which a portion was overdue and unpaid, which bills were endorsed by Winans to plaintiffs, and their paper, payable at the banks in Canada, taken by him in lieu of such sterling bills: That Winans should have provided funds to pay said bills in England, but being unable to do so, he had agreed to make this security to the said Mitchell to secure them against all loss, damages, and expenses which may accrue to them by reason of said bills, and the nonpayment thereof, or of any portion thereof. Wherefore, in consideration of the premises and of five shillings, said Winans bargained, sold, assigned and set over, to said Mitchell, his executors and assigns, certain leasehold premises therein mentioned and described, in the town of Cobourg, to hold during the residue of the term, &c, subject, as to part, to a mortgage thereon to George E. Castle, for £1100.

“Provided always, and the said indenture was made on the express condition that if said Winans, his executors, &c., did and should well and truly retire the said sterling bills, and pay or cause to be paid unto the said firm of plaintiffs, or to the parties legally entitled to the same, all sums of money, damages, costs, disbursements and expenses, incurred or

payable by reason of the said bills of exchange, and the nonpayment thereof, or of any or either of them, or any part thereof, within twelve months from the date of said indenture ; and if he shall then well and truly indemnify and save harmless the said (plaintiffs) of, from and against all payments, damages, and expenses by reason of the premises, then from and immediately after the preformance, &c, of all and every the provisions, agreements, and stipulations in the said proviso particularly set forth, the said indenture to be null and void, &c.

"Provided always, that if (plaintiffs) shall not pay or cause to be paid the said bills of exchange and promissory notes, or any or either of them, so given, made, drawn, or accepted by them, in lieu of, and in exchange for the said sterling bills ; or if they shall not sustain damage, or if damage, then if they shall only sustain partial damage by reason of the said sterling bills—then this security shall not enure to the said Mitchell for the full amount, but only for such sum as the said (plaintiffs) or their assignees shall have paid and disbursed for and on account of the said Winans, by reason of the premises, or any or either of them. And said Winans covenanted with said Mitchell that he, his executors, &c., should and would in every thing well and truly observe, perform, fulfil and keep, all and singular the provisions, agreements and stipulations in the above proviso set forth, according to the true intent and meaning thereof, and of said indenture, &c., and that he had good right to assign, &c., except as to Castle's mortgage. And also, that in case of default by him (W.) in performing &c., all, or any or either of the provisions, agreements, &c, in the above proviso for redemption set forth, then the said Mitchell should and would, after three calendar months' notice in writing to said Winans, his &c., absolutely sell and dispose of the said leasehold lands, tenements and premises, &c., and out of the proceeds reimburse the (plaintiffs) all damages, sums of money, costs, charges and expenses, which they might have been put to and paid by reason of the premises, or any of them, or of the said indenture, &c., with power to plaintiffs to assign the same to purchasers, &c. Provided always, and it is declared and agreed, that until default shall take place as aforesaid, and until the expiration of notice as aforesaid, the party of the first part (W.), &c., shall retain and keep possession of all and every of the tenements and premises thereby conveyed or intended so to be. Executed under seal by Winans in person, and Mitchell by his attorney, Fraser ; registered 9th January, 1855."

No proof was given in support of the first and fourth pleas,

and the plaintiffs had a verdict for the amount of the bills, ten per cent. damages, interest, &c.

In Easter Term last, *Vankoughnet*, Q. C., obtained a rule upon the plaintiffs to shew cause why the verdict should not be set aside and a verdict be entered for the defendants, or for the defendant Poore, or to reduce the amount of the verdict, or for a new trial on the law and evidence.

McDonald, for the plaintiffs, contended that a mortgage was not between the same parties as the parties to this suit, and that there could be no merger; that the indenture was only collateral to secure certain bills therein referred to, but without mentioning any particular amount, and with a nominal consideration of five shillings. That the intention was, that it should operate as a collateral security, and not as a substituted security; and that, as worded, it could not merge the bills. That the covenant to pay is not express, but is to comply with the terms of the proviso, which at best would amount only to an implied covenant to indemnify &c. That the plaintiffs do not engage to stay proceedings on the bills for twelve months, and only accede to that time being appointed for the mortgagor to relieve his estate by performing the proviso, and to refrain from proceeding upon the mortgage until default thereon. He referred to *Holmes v. Bell*, 3 Scott N. R. 479; S. C. 3 M. & G. 213; *Matthewson v. Brouse*, 1 U. C. Q. B. R. 272; *Murray v. Miller*, 1 *Id.* 353.

As to the ten per cent. damages, that the verdict was correct under the P. S. 13 Vic. ch. 76, sec. 1; and interest, to be added under sub-section No. 2.

Vankoughnet, in reply, relied on *Matthewson v. Brouse*, 1 U. C. Q. B. R. 272, as in point in the defendants' favor; reading and comparing the terms of the mortgage with the language of the court in that case. That the mortgage had the effect of extending the time for paying the bills twelve months from the 2nd January 1855; and if not, the plaintiffs might sue upon and collect the amount of the bills before that day out of the goods of the parties, keeping at the same time Winans' property tied up and held by the mortgagee. That though not all the same parties, Mitchell represented the plaintiff on one side, and Winans both the defendants on the other, and Poore was discharged.

That an express covenant to pay the amount of the bills would merge them, and it is the same in effect here, whatever might have been intended.

As to damages: that the bills are drawn and accepted in Upper Canada, and though payable in London, are payable generally under the statute; the words "only, and not elsewhere," not having been inserted in the bills. Wherefore they are not drawn upon Poore at any place in Europe, for they were drawn upon him at Cobourg in Upper Canada, where they were accepted, and might or ought to have been presented to him for payment.

He seemed to concede that the plaintiffs would be entitled to four per cent. damages; but how so, if the bills were merged or not due when the action was brought?

MACAULAY, C. J.—The first question is whether the indenture supports the second and third pleas by shewing that the plaintiffs did agree to give time to Winans, as alleged. If not, then, secondly—whether the damages ought to be reduced to the extent of ten per cent. or any less sum; ten per cent. as upon protested foreign bills on London under the statute in that behalf, being included in the verdict.

It appears to me that the pleas do not rely upon the indenture of mortgage as discharging one defendant more than the other, nor upon its constituting a merger or release of the bills, but upon its amounting to a contract or agreement on the plaintiff's part to give time to Winans to retire the bills, &c.

No authority was cited to shew that as an accommodation acceptor Poore would be discharged if the plaintiffs did give time to Winans as alleged, and several cases seem against it. There was nothing to prevent Poore taking up the bills at maturity or paying them off at any time—*Byles on Bills* 180 and note (*f*), *Fentum v. Pocock* (5 Taunt 192), *Price v. Edmunds* (10 B. & C. 578), *Harrison v. Courtauld* (3 B. & Ad. 36), *Nichols v. Norris* (3 B. & Ad. 41).

It is to be observed that the parties to the mortgage do not include all the plaintiffs, nor both the defendants, who are sued in this action on different grounds of liability, but one of each—that is, Mitchell and Winans.

If the indenture of mortgage did amount to an agreement binding on the plaintiffs to give twelve months' time to Winans to take up the bills &c., the sufficiency of the second and third pleas as a bar in point of law is not now the question; but what is the legal construction and effect of the mortgage in relation to, and as in fact establishing the agreement to give time alleged in those pleas?

It is not contended that if Mitchell, one of the plaintiffs, agreed to give time as alleged it does not bind all the plaintiffs, in whose behalf he acted; at all events it bound him, one of the plaintiffs. The agreement then seems to be, that though not directly expressed the mortgage does impliedly contain an agreement by Mitchell to give Winans twelve months' time to redeem the bills &c., on the ground, among others, that being an indenture *inter partes*, its words are those of both parties, and that inasmuch as Winans' covenant is to perform all the provisions, agreements and stipulations in the proviso set forth, he covenanted to pay off the several bills within twelve months from the date of the indenture, whence it must be inferred, from the plaintiff Mitchell accepting such a covenant in connexion with the rest of the instrument, that he agreed to grant twelve months to make such payments, and in short, extended the time for payment of each bill respectively until the expiration of twelve months from the 2nd January 1855. If they did not become merged in the covenant *quoad* Winans, it may be proper to consider how far the indenture does amount to such an agreement as the pleas allege—to inquire whether it released or merged the bills; for if not, it must then remain the only question whether independently thereof it extended the time of payment for each bill due or not due as subsisting securities, or whether it constitutes a collateral security only, without affecting the terms of the original securities, viz—the bills of exchange declared upon, or the plaintiffs' remedy thereunder as holders,—Byles on Bills, 176-8. I do not think it released or merged the bills. It certainly did not release Winans therefrom; nor could it have intended to merge them, because the very terms of the proviso are that Winans should retire them and pay all damages &c., within twelve months from date.

Moreover, it recites that he had agreed to make that security to secure them, not to absorb or supersede them. It seems to me therefore to amount only to a collateral security.—Byles on Bills, 182-4. *Drake v. Mitchell* (3 East. 251), *Solly v. Forbes* (2 B. & B. 38), *Twopenny v. Young* (3 B. & C. 208), *Bell v. Banks* (3 M. & G. 258), *Weston v. Foster* (2 Bing. N. S. 693), *Holmes v. Bell* (8 M. & G. 220), *Emes v. Widowson* (4 C. & P. 151), are much in point. *King v. Hoare* (13 M. & W. 494-6), *Thimbleby v. Barron* (3 M. & W. 210), *Ford & Beech* (11 Q. B. 852-869, S. C. 12 Jur. 310), *Gibbons v. Voiullon* (8 C. B. 485, S. C. 11 Ju. 66), *Belshaw v. Bush* (17 Ju. 57, S. C. 14 Eng. Rept. 269), *Squire v. Ford* (15 Ju. 619, S. C. 5 Eng. Rep. 82), *Henderson v. Stobart* (5 Ex. Rep.), *Lyth v. Ault* (7 Ex. Rep. 669), *Allenby v. Dalton* (5 L. J. O. S. Q. B. 312), *Andell v. Baker* (15 Q. B. 20), *Matthewson v. Brouse* (1 U. C. R. 272), *Murray v. Miller* (1 U. C. R. 358), *Bank B. N. A. v. Jones et al.* (8 U. C. Q. B. R. 86), *Bank U. C. v. Sherwood* (8 U. C. Q. B. R. 116), *Owen v. Homan* (15 Ju. 339, S. C. 3 Eng. Rep. 112-126.) These cases, though not all equally, shew, I think, that this was a collateral security only, and not a merger of the bills as substituted in their place, nor is a merger or a release pleaded.

It is to be assumed that in most of the foregoing cases the debts or securities in question were due and payable, and rights of action therefore had vested in the creditors; whereas here only the bill mentioned in the first count was due and payable, and the others declared on were still running; whether any others existed, due or outstanding to which the indenture refers, we are not informed. But as respects intention, if it be clear that the right of action vested in the plaintiffs under the first bill was not put an end to, and would not be extinguished or suspended, even by an explicit collateral undertaking to give time, it shews that it was not intended to alter or suspend the rights of the plaintiffs in relation to the bills not yet due, but that the object was collateral security.

Then, on the other point, the argument in effect is, that by the indenture the plaintiffs extended the time for paying the

bills, including those over due, as well as those not then due. As to those overdue, it is clear such an agreement would not be a good legal bar. And as to those coming due, it is not so agreed unless by implication.

In *Emes v. Widdowson*, 4 C. & P. 151—assumpsit on two bills of exchange, drawer against acceptor—it does not appear whether both or either were due when the arrangement relied upon was made, in consequence of which the defendant assigned property as a security for certain sums then due, and also for all future demands. There was a power of sale in the assignment, but it was not to be executed until after six months' notice, which notice had not been given. The defence proceeded on the ground that the personal remedy was suspended. *Tindal, C. J.*, was of the opinion that such an assignment could only be considered as collateral security, and that the personal remedy was not suspended, as there was not any clause to that effect in the deed. It does not appear whether there was a covenant to pay; and one question here is, whether there is a covenant to that effect in the present indenture.

Bytes on Bills, 172-175; *King v. Gillett* (7 M. & W. 55), *Thimbleby v. Barron* (3 M. & W. 210), *Goss v. Lord Nugent* (5 B. & Adol. 58), *Foster v. Dawber* (6 Ex. R. 840-851), are material upon the nature and effect of subsequent agreements to prolong the time for the performance of executory contracts before breach,—6 Ex. R. 851-2, and American note at the end. But a distinction is taken between executory and executed contracts; and bills of exchange and promissory notes are spoken of as evincing executed contracts on the part of the drawee, payee or holder, and as requiring a new consideration to render an undertaking to extend the time binding as an agreement, even collaterally. So far as consideration is material, there is ample in the present case as between Winans and Mitchell. It does not therefore depend upon that point.—*Story on Promissory Notes*, secs. 413, 414, 416; *Story on Bills*, sec. 427; *Pring v. Clarkson* (1 B. & C. 14, S. C. 2 D. & R. 78), *Gould v. Robson* (8 East. 576), *Bedford v. Deakin* (2 B. & A. 210, S. C. 2 Star. N. P. C. 178)

Badnall v. Samuel (3 Price 521), Thomas v. Courtney (1 B. & A. 1), Philpot v. Briant (4 Bing. 7179, 21.)

Here the plaintiff Mitchell did expressly agree in the indenture, not to forbear twelve months upon the bills, but that until default, and the expiration of three months' notice, Winans should retain and keep possession of the leasehold lands, tenements, &c., transferred by the indenture of the 2nd January 1855. There is not a word about delay in prosecuting the bills; he did not agree to surrender or forbear proceedings on the bills, and the plaintiffs still hold them. One argument in favor of an implied undertaking to give time &c. is, that the effect of the mortgage was to tie up the property mortgaged, thereby abridging Winans' means of paying, and placing his assets beyond the reach of an execution; unless, as being the mortgagee of a chattel real, the mortgagor's right of redemption might be sold under the 12 Vic. ch. 73—a step that would be quite inconsistent with the terms of the mortgage before default, and which might be taken within the year, if plaintiffs can recover in this action.

There are also the terms of the second proviso in the indenture to be borne in mind, importing that the plaintiffs were to take up the bills if outstanding, or lose the benefit of the mortgage security except *pro tanto*.

I have not overlooked those weighty considerations. But it may be asked, whether, if not paid at maturity, it was necessary for the plaintiffs (if holders) to present them for payment, or to give notice of nonpayment, to Winans. It was probable Winans could not object to the want of notice, had it been omitted, on the ground that in the indenture he admits the want of assets in the acceptor's hands and his inability to supply funds, and so of presentment for payment.—Terry v. Parker (6 A. & E. 502), Byles on Bills 160. Still the consideration is, whether the bills were dishonored when presented, or would be so, even if not presented; and if so, whether a right of action vested thereon in the plaintiffs as holders. That may be tested by supposing this action had been deferred till the twelve months had expired: Could the plaintiffs then have sued and recovered on the bills, or was Poore discharged, and their only remedy against Winans on his covenant? This seems to refer it back to the test whether

the bills were merged or absolutely extinguished and at an end; for if they were to continue as subsisting securities independently of the mortgage, the mortgage could only operate as a collateral security. It might however, nevertheless, contain an agreement to extend the time for payment, and therefore suspend any right of action thereon till the twelve months had elapsed; and that is what the plea as to the fact alleges, whether a valid legal defence in law or not. Can it be said that in consideration of Winans' executing the mortgage security, the plaintiffs, through Mitchell, accepted it in satisfaction or discharge of the bills, or agreed to extend the time for the payment thereof by him as drawer, and liable over to the plaintiffs, for twelve months? The answer seems to be that it was either collateral security or a substituted satisfaction; and if—as I think it was—a collateral security only, it follows that it is beside the bills, which remain as the first security; and that being the case, the plaintiffs' rights as holders thereof should not be curtailed by implication. And as the instrument of the 2nd of January 1855 does not in explicit terms grant or extend the time for payment of the bills as continuing securities for twelve months, it cannot be inferred from the mere fact of the acceptance of such collateral security redeemable in twelve months, with a covenant to perform the proviso—*Kendrick v. Loma* (2 C. & J. 405, S. C. 2 Tyr. 438), *Bishop v. Rowe* (3 M. & S. 362), *Dillon v. Rimmer* (1 Bing. 100), *Lumley v. Musgrave* (4 Bing. N. S. 9), *Lumley v. Hudson* (ib. 15), *Belshaw v. Bush* (17 Ju. 67, S. C. 14 Eng. 269, S. C. 11 C. B. 191), *Griffiths v. Owen* (13 M. & W. 58), *James v. Williams* (13 M. & W. 828.) The effect of negotiable securities in suspending vested rights of action, as distinguished from mere agreements not to sue for a specific time—*Byles on Bills*, 288-292. Was it intended, or is it the legal effect, that the bills were to be in abeyance for twelve months, and so to constitute in themselves securities for Winans' performance of his covenant; or were they at an end, or did they subsist *intact*, with all the ordinary rights attending them? There is certainly an apparent inconsistency in the plaintiffs taking a mortgage with twelve months to redeem or perform

the condition—viz : payment of the bills—and at the same time to retain and exercise a right to sue upon the bills in the meantime.

But, upon the best consideration I can give the subject, it appears to me the mortgage is only a collateral security. The first proviso requires Winans to retire the bills &c. within twelve months. It has not been contended that he was to do so promptly at maturity, but he was to do it within twelve months, in whosoever hands they might be as the lawful holders thereof; and he became bound to Mitchell to pay the plaintiffs, or the parties legally entitled to the same, all sums of money or damages incurred or payable by reason of the said bills of exchange, and the non-payment thereof, &c. This seems a collateral undertaking, and to assume the continuance of the bills as negotiable securities.

The plaintiffs do not grant time to pay them, but the drawer covenants with one of the plaintiffs to retire them and pay all damages within twelve months to whoever may be entitled to the same, so as to indemnify the plaintiffs (his endorsers, and as such liable to those holding under them) in relation thereto. If endorsees of the plaintiffs held them, they of course could have sustained actions thereon against the defendants; and if the plaintiffs took them up, or had held them all along, they were equally entitled to enforce them. This is, I think, the more correct view of the transaction, although probably not contemplated by the parties to the mortgage at the time.

I have not laid stress upon the mortgage being not only collateral as a security, but collateral as to parties—one only, and not all of the plaintiffs, and one only of the defendants, being parties thereto. If the party of the second part (Mitchell) undertook to give time by the terms of the mortgage instrument, he must have covenanted so to do, but his covenant did not include the other plaintiffs, though partners and jointly interested. He alone could sue Winans thereon. It is not pleaded that one of the plaintiffs covenanted to give time to Winans &c., but all the plaintiffs agreed to do so. I do not think the evidence supports such allegation; at all events, I apprehend that the agreement

at the utmost, even as the pleas state it, would only be, not to sue upon the bills for a time, certainly as respected the one overdue, and also as to the others, if only collateral, and they were not themselves extended, as to the plaintiffs' right to treat them as overdue against Winans. And it is well established that such an agreement cannot be pleaded in bar of an action on the original debt or security, and the pleas would in that event be bad in law, and the plaintiffs be entitled to recover *non obstante*.

As to the damages, it is to be observed that each of the bills is dated, and drawn by McKechnie and Winans, at Cobourg in Upper Canada, upon Sir Edward Poore, Cobourg—that is, at the same place—payable to the order of the drawers “at the Union Bank of London, London,” meaning in England, where they were presented for payment, and protested for nonpayment, being accepted generally.

The 7 Wm. IV. ch. 5, sec. 1, related only to special acceptances, not bills drawn payable at a particular place. By the 12 Vic. ch. 22, sec. 7, it was enacted that every bill and note shall be taken to be payable generally, unless it be expressed in the body thereof that the same is payable at a bank or other place only, and not otherwise or elsewhere, and every acceptance of a bill shall be deemed and taken to be a general acceptance unless the same be expressed to be payable at a bank or other place only, and not otherwise or elsewhere; and the acceptance on such bill, and the promise on such note so made, payable at a bank or other place only, and not otherwise or elsewhere as aforesaid, shall be, and be taken to be, a qualified acceptance of such bill or promise of such note; and the acceptor or maker shall not be liable to pay the said bill or note, except in default of payment, when such payment shall have been first duly demanded at such bank or other place—See sec. 13, post.

The 13 & 14 Vic. chap. 23, sec. 4, restricted this clause, enacting that if in any bill or note, or in the acceptance thereof, the same be made payable at any stated place, it shall be understood to be made payable at such place only, and not otherwise or elsewhere, and the promise or acceptance shall be held to be qualified accordingly; provided always,

that this section shall not extend to Upper Canada,—*Holstead v. Skelton* (5 Q. B. 86), *Blake v. Beaumont* (4 M. & G. 7), *Wilmot v. Williams* (7 M. & G. 1017.)

12 Vic. ch. 22, sec. 13—Every bill or note payable at such bank or other place only, and not otherwise or elsewhere, shall (*qu. may*) at maturity be presented for payment at such bank or place only; and every bill or note payable generally, shall at maturity be presented to the acceptor or maker, either personally or at his then residence or office, or usual place of business &c.—*Ridout v. Manning* (7 U. C. Q. B. R. 35)—*Vide* 13 & 14 Vic. ch. 23 sec. 4.

51 Geo. III. ch. 9, sec. 2—Bills drawn by any person residing in the province, upon any person in Europe, &c., returned under protest for nonpayment &c., upon protest for nonpayment of bills of exchange, drawn, sold, or negotiated within Upper Canada, although not drawn on or by any person residing therein, shall in the following cases be as follows, &c.: *i. e.*—If such bill shall have been drawn upon any person or persons at any place in Europe, or in the West Indies, or in any part of America not within this Province, or any other British North American Colony, and not within the territory of the United States, ten per cent. upon the principal sum specified in such bill. If drawn upon any person or persons in any of the British North American Colonies or in the United States, four per cent. &c.—*See* secs. 2 & 4 stat. 14 & 15 Vic. ch. 62 sec. 5; *Rothschild v. Currie* (1 Q. B. 43), *Allen v. Kemble* (13 Ju. 286), *Amner v. Clarke* (2 C. M. & R. 468), *Byles* 299-63-64, *Potter v. Brown* (5 East. 124), *Trimbey v. Vignier* (1 Bing. N. S. 151), *Don v. Lipman* (5 C. & F. 1, 12, 13), *Pring v. Clarkson* (1 B. & C. 15), *Kearney v. King* (2 B. & A. 301), *Allan v. Kemble* (13 Ju. 287), *Truscott v. Billings* (T. T. 1 & 2 Vic.) *Commercial Bank v. Johnson* (2 U. C. Q. B. R. 126), *Ridout et al. v. Manning et al.* (7 U. C. Q. B. R. 35), *City Bank v. Lay* (1 U. C. Q. B. R. 192), *Matthewson v. Carman* (1 U. C. Q. B. R. 259), *Smith v. Hall* (3 U. C. Q. B. R. 315), *Gibbs v. Fremont* (17 Ju. 820).

The 12 Vic. ch. 22 has been held by the Court of Q. B. U. C. to have force of law in Lower Canada only; and the sub-

sequent statute, 13 & 14 Vic. ch. 23, sec. 4, is declared not to extend to Upper Canada; but whether that was in consequence of, or before, or after, the decision of the case of *Ridout v. Manning*, the dates in the printed report and statutes do not shew. Excluding the application of 12 Vic. ch. 22 from Upper Canada, it follows, especially in reference to the 13 & 14 Vic. ch. 23, sec. 4, that the law regulating bills of exchange and promissory notes, in several important particulars, is not uniform, in the two great divisions of the present Province of Canada. In Upper Canada—rejecting 12 Vic. ch. 22, and abiding by several decisions in Q. B., which until reversed in appeal, or superseded by the legislature, we think, should be followed—the law as respects the place of payment of bills of exchange like the present, is to be taken from the law of England, the statute of U. C. 7 W. IV. ch. 5, and the 12 Vic. ch. 76; the effect of which is, that being made payable at a particular place in the body of them, these bills are by their own terms made payable there as respects both drawer and acceptor, and there only as respects the drawer, though not absolutely as to the acceptor without the addition of the words ‘only, and not otherwise or elsewhere;’ which words, in relation to bills of exchange, relate only to special (as distinguished from general) acceptances. Here the acceptance itself is general; but the contract arising thereupon, in reference to the body of the bill, is to pay at the Union Bank of London, in London; therefore, though drawn and accepted in Upper Canada, they are payable in London, where they were properly presented.

Then as to damages—*lex loci contractu*, and of the form in which the action is brought, govern the question of damages. The bills are not drawn upon a person then personally resident at any place in Europe, but upon a person then resident in Upper Canada, requesting him to pay at a place in Europe; it is in effect drawn upon him at (*i. e.*, payable at) the Union Bank in London.

I think the spirit of the act is best sustained by holding that as respects the right to claim damages the present constitute foreign bills drawn upon a person at a place in Europe; for, being drawn payable at a place certain in Europe—

viz., the Union Bank of London, in London—they are in effect drawn upon and accepted by the drawee, payable at that place, though his acceptance be general within the 7 W. IV. ch. 5. It is not drawn upon him at a place in Canada or elsewhere, but at a place certain in Europe, and accepted generally. It is drawn upon him at the place where by its terms it is made payable. If the word “payable” had been inserted or been understood before the words, “at any place in Europe,” it would read, “drawn upon any person at a place in Europe,” there would be no doubt, and I think such is the effect of the statute as worded.

Putting the mortgage out of sight as against the drawer (Winans), it was incumbent upon the holder to present the bills at the Union Bank, and consequently he is liable to the ten per cent. damages. It was not necessary to present them there to render the acceptor liable, because of his general acceptance; but it was competent to the holder to present them there, and such presentment was sufficient, as against both acceptor and drawer. I do not find that when, as in this case, the bills are accepted in Upper Canada, the acceptor being sued here, is not liable to the ten per cent. damages, upon default in payment of bills so accepted, and payable at a place in Europe, as well as the drawer or endorsers; and the bills being in the body of them made payable at a place certain in London, and the holder entitled to present them there for payment, and having presented them there, I apprehend they are within the spirit of the statute, and that the plaintiffs are entitled to the damages allowed thereby, as they would have been liable to their endorsees, had they transferred the bills to others by endorsement in Upper Canada.

McLEAN, J., and RICHARDS, J., concurred.

Per Cur.—Rule discharged.

COULTER V. LEE.

Consideration—Partial failure of.

To a declaration on a promissory note, the defendant pleaded as to £157 10s. part &c., that the plaintiff represented he was owner of certain lands and that he was the equitable owner of lot 14 &c. through one R., who had purchased it from the crown on behalf of the plaintiff, and held the same as trustee for him, and that the plaintiff then *falsely and fraudulently* represented to the defendant that he could procure said R. to make an assignment of his interest therein, and that the defendant was induced by the same representations to accept the plaintiff's offer to sell to him the defendant the same; whereupon the plaintiff, by deed-poll, conveyed all his right and interest in the said lands to the defendant; that defendant paid part down and gave his two promissory notes for the balance, one of which is the one declared upon; that at the date of said deed-poll and notes the plaintiff had no right or interest in said lot 14, and that said R., although requested, refused to assign his interest in said lot to the defendant.

Held, that such plea was no answer to the action, the contract being entire, and the failure of consideration not being definite as to this note.

ASSUMPSIT on a promissory note made by the defendant on the 6th of May 1854, to the plaintiff or order, for £213 12s. 6d. with interest, six months after date. Plea, as to £157 10s., part &c., that the plaintiff represented to the defendant (as the fact was) that he had the right and title to certain lands mentioned, and that he had also represented that he was equitable owner of lot number 14 in the 2nd concession of the township of Tosoronto, through one Ruthven, who had purchased it from the crown on behalf of the plaintiff and held the same as trustee for him; and that the plaintiff then *falsely and fraudulently* represented to the defendant that he could procure him to make an assignment of his interest therein to the defendant, upon being requested so to do; and that the plaintiff so representing and offering to sell all his right and interest in the said lands to the defendant, being in the whole eight hundred and sixty acres at 15s. 9d. per acre, amounting to £677 5s. payable £250 down and the balance to be secured by two promissory notes for £213 12s. 6d. each, made by the defendant to the plaintiff, the defendant was induced by the said representations to accept the offer, whereupon, at the time the said promissory notes were made, the plaintiff, by deed-poll, whereby, in consideration of £677 5s., the receipt whereof is acknowledged, sold and assigned to the defendant all his right, title and interest of, in and to the aforesaid lands; that the defendant paid to the plaintiff £250 down, and made to him his two promissory notes for £213 12s. 6d.

each, one of which is the one declared upon; that at the date of said deed-poll and notes the plaintiff had no right or interest in the said lot number 14 to convey or assign, nor did he then or since procure said Ruthven to assign to the defendant his interest therein, although both the plaintiff and the defendant requested him so to do, but refused, the defendant being willing to accept such assignment; and that said Ruthven had since incapacitated himself from assigning, by conveying his right and interest to another, &c. As to residue, *nul dicit*, and judgment taken for residue &c.

Replication—*De injuria* and issue.

The defendant proved the deed-poll stated in the plea, being a general assignment of all the plaintiff's right, title or interest of, in, and to the lots of land therein mentioned, including lot number 14 in the second concession Tosoronto, without any covenants. Also a certificate of sale by John Alexander, Crown land agent, dated Barrie, 9th of February 1854; receipt from Alexander Ruthven for £7 10s, upon this lot, 200 acres at 7s. 6d. per acre.

Also an assignment not executed from said Ruthven to the defendant of all his right and title &c. to said lot of land, dated the——day of——1854, with a blank affidavit of execution not sworn, annexed.

Also a memorandum drawn up by the attorney of the parties:

(*Coulter to Lee.*)

" 860 acres at \$3	\$2580
" Paid by Coulter \$120 for 800 acres, \$9 for 60 acres ...	129

4) 2709	\$2709
677 5."	

\$1000 on or before the 14th of May; balance, half in six months and half in twelve months, secured by note of Lee, with other figures; shewing that \$2709 or £677 5s. less £250, less £427 5s, halved £213 12s. 6d.

It was proved this memorandum shewed the basis of the transaction.

The note declared upon was not produced, nor was any notice to produce given to the plaintiff or his attorney; but the witness represented that a note of the same date and

amount corresponded with one of the notes made on this sale.

It was also proved that Coulter had himself purchased the lot of land from the crown agent in the name of Ruthven, without his knowledge or consent, and that Ruthven refused to ratify the act upon being requested to execute an assignment to the defendant, after the plaintiff had made the deed-poll to him.

There was also evidence that the plaintiff had represented to the defendant that Ruthven would execute such assignment any time upon request, and said he would get it done, which satisfied the defendant, who, relying upon receiving such assignment, paid the money and gave the notes or papers said to be notes, for no notes were produced.

For the plaintiff it was contended that the defendant could not give proof of the notes referred to, or either of them, without producing them, although the note declared on was not denied by plea, such production being essential to establish the identity. Also, that the failure of the consideration was partial, and applied equally to the sum paid and the other note; and the sale being of a larger quantity of lands at so much an acre, it could not be said the failure was of a specific sum on account of this particular lot, which in itself may have been worth more or less than the average price per acre agreed to be given for the whole.

The learned judge who tried the cause (Macaulay C. J.) did not yield to the first objection, and the second being rather an objection to the plea in point of law, he did not decide it, but left it to the jury to say whether there was a failure *pro tanto*, and if so, whether it constituted a failure of so much as to this note. The jury assessed damages to the plaintiff for the difference, but found the issue in favour of the defendant.

During last Easter Term (June 1855) Dalton obtained a rule on the defendant to shew cause why the said verdict should not be set aside, for misdirection and the admission of improper evidence, or for judgment *non obstante*.

Read shewed cause during this term. Dalton replied.

The cases cited on the first point were Lawrence v. Clark,

14 M. & W. 250; *Read v. Gamble*, 10 A. & E. 597; *Goodered v. Armour*, 3 Q. B. 956; also *Halton v. Ward*, 15 Q. B. 26.

On the second point—*Trickery v. Larne*, 6 M. & W. 278; *Willis v. Hopkins*, 5 M. & W. 6; *Kellogg v. Wyatt*, 1 U. C. Q. B. R. 445, 448.

MACAULAY, C. J., delivered the judgment of the court.

I am much disposed to think the defence fails on this ground also, the contract was entire; and the failure of consideration, though in one sense definite, was not so in reference to this note exclusively, and I do not see how it could be so *pro tanto*, distributing it (the deficiency) over the two notes and the money paid, ratably.

As to fraud, the contract was entire, and the plaintiff has not repudiated the sale wholly or in part, nor has he returned or offered to return the papers he received, or to rescind the sale *quoad* this lot.

As to judgment *non obstante*—that the plea was one of fraud, and therefore a bar; judgment *non obstante* is only on the merits, and the plea does not shew that the defendant can have no defence on the merits; at all events, we at present only merely decide upon a new trial without costs.

McLEAN, J. and RICHARDS, J. concurred.

WOOD v. LANG.

Deed, construction of—Growing crops.

By a deed of conveyance of all and singular that certain parcel of land, &c., together with all the houses and easements, profits, privileges, hereditaments, &c., to said parcel of land belonging or in anywise appertaining, and all the rents, issues and profits thereof, &c., growing crops in the ground at the time of the execution of the deed will pass to the grantee.

McLEAN, J., *dissentiente*.

TROVER for wheat. *Pleas*—Not guilty and not possessed.

The facts were—The plaintiff, by indenture of bargain, and sale bearing date the ninth of December, 1853, and made between himself and the defendant, in consideration of nine hundred and fifty pounds, granted, bargained, sold, aliened, released, conveyed, and confirmed to the defendant

and his heirs, all, &c., being composed of the north part of lot number two, in the tenth concession of the township of Windham, one hundred acres, and therein specially described, together with (in print) all and singular the houses, buildings, woods, waters, easements, privileges, profits, hereditaments, and appurtenances thereto belonging or in anywise appertaining, or therewith used and enjoyed, or known or taken as a part or parcel thereof, or as belonging thereto or to any part thereof, &c., and all the rents, issues, and profits thereof, and all the estate, right, title, interest, property and demand at law and in equity of the plaintiff of, in, to or out of the same. *Habendum* to the defendant and heirs in fee.

At the time of the execution of this deed the plaintiff had wheat sown in the autumn, in one of the fields thereby conveyed; which wheat the defendant cropped in the following harvest, and forms the subject of this action.

The plaintiff offered parol evidence to shew that half of the wheat was reserved to the plaintiff, when the deed was executed, which was objected to as inadmissible.

A verdict was rendered for the plaintiff, with leave to the defendant to move to enter a nonsuit.

During Easter term, *Vannorman*, for defendant, obtained a rule upon the plaintiff, pursuant to leave reserved, to shew cause why the verdict should not be set aside and a nonsuit entered.

M. C. Cameron shewed cause during the same term.

MACAULAY, C. J.—It appears to me that the growing crops in the ground passed by the deed; and the only question is whether it can be treated as exempted by reason of the defendant's subsequent declarations.—*Baker v. Dewey* (1 B. & C. 704); *Flinn v. Calow* (1 M. & G. 589); *Earl Falmouth v. Thomas* (1 Cr. & Mee., 88 S. C. 3 Tyr. 26.)

The merits of this case being seemingly with the plaintiff, I have endeavoured to find authority on which the court might satisfactorily rest a decision in his favour, but I cannot say I have been successful. A verbal reservation of the growing crops or half the growing wheat, accompanying a deed of the land in terms that transferred the right of property in such

crops or wheat, cannot afterwards be set up in opposition to the deed; it is inconsistent with it; and contradictory to its legal import.

Then subsequent verbal admissions of such fact, or of the plaintiff's being entitled to half of the wheat, without any new or additional consideration beyond the consideration mentioned in the deed of conveyance, seem equally insufficient. There was no subsequent or independent contract for half of the crops; all was included in the original transaction. The growing wheat passed by the deed, or it did not. If it passed, as I think it did, it became the defendant's property; and if so, his right thereto would not be diverted by his afterwards, saying that half of it belonged to the plaintiff: such admissions could only be available as proving that the property in the subject matter did not pass by the deed, that is, in the absence of any separate or distinct contract relative thereto; and if it did not pass, it must have been reserved or excepted, and to prove that by parol is infringing upon the terms or import of the conveyance. The actual bargain seems to have been concluded between the parties in private; and if it was agreed that half the wheat was to remain to the plaintiff, it shews that the other half was to go to the defendant; and the deed shews, whether inadvertently or not, that the whole passed to the defendant; the plaintiff parted with his right under such; and I cannot satisfy myself that the effect of such deed can be controlled and altered by the verbal evidence offered in support of this action, which, treats the wheat in question as personal property of the plaintiff wrongly converted by the defendant.

The plea denies plaintiff's alleged right of property, and the evidence fails to establish it. I think the rule should be made absolute.

MCLEAN, J.—It appears from the evidence and the finding of the jury that at the time of the execution of the conveyance there was an understanding and agreement between the parties that only one half of the wheat in the ground was to pass to the defendant and that the other half was reserved by the plaintiff for his own use; and if such agreement did not require to be in writing, the plaintiff's verdict ought not to be disturbed.

In the case of *Rodwell v. Philips* (9 M & W. 501) an agreement in writing to sell to the plaintiff all the crops of *fruit* and vegetables in a certain portion of a garden from *large pear trees*, was held to be an agreement for the sale of an *interest in lands* and to require a *stamp*.

Lord Abinger, in giving judgment, said there were a great many cases in which a distinction is made between the sale of *growing crops* and the sale of *an interest* in lands; and that no general rule is laid down in any one of them which is not contradicted in some other. The court thought that case ought to be governed by any of those in which it is decided that a sale of growing crops is a sale of goods and chattels; growing *fruit* would not pass to an executor, but to the heir. In the course of the argument Lord Abinger remarked that the difference appeared to be between *annual productions* raised by the *labor of man* and the *annual productions* of *nature*, not referable to the industry of man except at the period when they were first planted—*Parker v. Stainland* (11 East. 362), *Warwick v. Bruce* (2 M. & S. 205), *Evans v. Roberts* (5 B. & C. 829), *Sainsbury v. Matthews* (4 M. & W. 343.) Sales of potatoes growing on the land to be dug by the purchasers, held to be sales of goods and chattels. *Jones v. Flint* (10 A. & E. 753)—see 2 P. & D. 594. Lord Denman says, "Three things were the subject matter of the contract, crops of corn, potatoes and the after *eatage* of stubble and lay grass; of these all but the lay grass are *fructus industriales*; as such they are seizable by the sheriff under a *Fieri Facias* and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as settled that the contract would have been held to be a contract merely for the sale of goods and chattels; and although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from their original character, not to be on that account a contract for the sale of any interest in land. He refers to the case of *Evans v. Roberts* (5 B. & C. 829, S. C. 8 D. & R. 611) in support of this view.

In the case of *Jones v. Flint* the only question was, whether the crops of corn and potatoes, being included in the

same contract with the *eatage* of *stubble* and *lay grass*, which were not of the same character of annual productions by the labor of man, the whole must not be regarded as coming within the fourth section of the Statute of Frauds; but the court held that as the cattle of the defendants were to run with those of the plaintiffs on the stubble and lay grass, the contract as to that did not amount to a sale, but must be considered rather as an agistment of the plaintiff's cattle by the defendant.

Earl of Falmouth v. Thomas (1 C. & M. 88, S. C. 3 Tyr. 26)
—Declaration stated that the plaintiff was possessed of a farm, upon which were certain growing crops, and on which the plaintiff had done certain work and labor, expended certain materials in making the lands ready for tillage, of which work, labor and materials the plaintiff had not derived the benefit; and that in consideration the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the crops and pay for them and for the work, labor and materials, according to a valuation. Averages that the plaintiff let the farm accordingly and left the crops upon it, and that the defendant took possession of the farm and had the benefit of the work, labor, and materials, and that the valuation was made, but the defendant did not pay.

Plea—That the crops, and the benefit of the work, labor and materials, were not excepted or reserved out of the letting or agreement to let, and that there was no agreement in writing in respect of the causes of action, or any memorandum or note thereof signed by the defendant or any person by him lawfully athesized.

Demurrer—Held that the contract was for an interest in land, and that the right to the crops and the benefit of the work and labor were both of them an interest in land within the fourth section of the Statute of Frauds.

In this case the contract was considered *entire*, and the part relating to the crops and work and labor could not be separated from that relating to the letting of the farm for fourteen years. Had the cutting been for one year by parol, and the agreement only for such crops as had been cultivated

by labor during the season, there can scarcely be a doubt that the plaintiff would have been entitled to recover, though the contract might be regarded as entire. If however the work and labor bestowed upon the land to prepare it for tillage, and which could not be withdrawn or separated from the land, were sued for, it might be questionable whether it did not amount to an interest in land and coming within the provisions of the 4th section of the Statute of Frauds, by which it is declared that "no action shall be brought on any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing."

Lord Lyndhurst says, "At the time when each of these contracts (there were several counts varying the statements of contracts) upon which the plaintiff sues is stated to have been made, the crops were growing upon the land, the defendant was to have the land as well as the crops; and the work, labor, and materials, were so incorporated with the land as to be inseparable from it."

The defendant would not have the benefit of the work, labor, and materials, unless he had the land; and we are of opinion that the right to the *crops* and the benefit of the work, labor and materials were *both of them an interest in the land*; but if *either* of the *two* were properly *an interest in land*, this would form a sufficient objection to the special counts, for the crops and work and labor united are the consideration in each count, and if either part of the consideration fails the plaintiff cannot recover."

I think that, under the authority of these cases, there can be no doubt that growing wheat, or any annual production of the soil, raised by the labor of man, must be regarded as goods and chattels liable to be seized on execution, and going, in case of death, to the executor or administrator, unless devised *with the land*; though at the time of death in such a state as to require further nutriment from the land to bring them to maturity.

The wheat which was growing on the land sold to the defendant was up to the time of the sale a portion of the

goods and chattels of the plaintiff, and liable to be sold as such for the satisfaction of debts, or for any other object the owner might have in view; he could, prior to the sale, have sold it apart from the land, and the purchaser would be entitled to take it at maturity, notwithstanding a sale of the land to another. The sale of potatoes or any other annual crop, according to the authorities to which I have referred, cannot be considered as a sale of an interest in land, and so requiring a note in writing under the 4th section of the Statute of Frauds. If the plaintiff then had a right to sell the growing wheat to one, and afterwards to sell the land to another, and such sales must be held good without any reservation being expressed in the deed, I cannot well understand why the owner should not be at liberty to stipulate with the purchaser of the land that he shall reserve the growing wheat, or any portion of it, to his own use, without reducing such stipulation to writing. If indeed the land had been sold and conveyed without anything being said as to the crop then in the ground, the defendant, as the purchaser, would be entitled to the immediate use and occupation of every portion of the soil and to all that the soil would yield; but if at the time of such sale and conveyance an express reservation was made of any crop or any portion of it, though the purchaser would have the fee, he must hold the ground till the crop arrived at maturity subject to the right of the owner to enter and take it away, and if prevented by the purchaser from taking it, or deprived of it in any way by him, the value must be recoverable in an action by the owner. Where a contract relating to growing crops forms part of an entire contract involving an interest in lands, as in the case of the Earl of Falmouth v. Thomas (1 C. & M. 88, S. C. 3 Tyr. 26), there must be a note in writing; but the contract in this case was not of that nature. The plaintiff was selling his land, and that he did by deed; but he did not *sell* the wheat in question; on the contrary, in order that he might himself have the use of it, it was expressly agreed between him and the defendant that only one half of the wheat should go with the land to the defendant; the defendant paid for one half only, the other half remained the property of the plaintiff, and being deprived of it by the

defendant contrary to the acknowledged agreement made respecting it, I think he is entitled to recover its value in this action and that the verdict found in his favor cannot properly be disturbed.

RICHARDS, J.—The difficulty in this case is to say how the plaintiff could under the facts stated be entitled to one half of the crop for which he sues; the whole would certainly pass to the defendant under the conveyance; then how did the plaintiff become interested in it? There is no reservation in the deed. If there had been a parol reservation before the execution of the deed the property in this wheat would nevertheless pass to defendant when the deed was executed. Then did defendant sell it back? There is no evidence of such sale further than a mere admission by defendant that plaintiff was to have half the crop. This sale, to be good under the Statute of Frauds, must have been in writing, the wheat having then been only a short time in the ground, and the value greater than ten pounds. The admissions must, I think, be taken to refer to the arrangement supposed to have been made between the parties at the time of the purchase, and before the execution of the deed, and no merely verbal agreement could be allowed to operate contrary to the legal effect of the deed, or to operate at all, as being contrary to the Statute of Frauds.

Rule absolute to enter a nonsuit.

THE MUNICIPALITY OF BERLIN V. GRANGE.

Assessment of unoccupied land of non-residents—Mode of collecting same &c.

A non-resident owner of lands can only be rated on the assessment roll by name at his own request. The taxes due on lands of non-residents cannot be sued for as a debt until they have been five years in arrear, and cannot be realized by a sale of the land in manner provided for in the act. *Macaulay, C. J.*, dissentiente.

Writ issued the 14th February 1855. Declaration in debt for £838 16s. 1d., recites that in and during the year 1854, the defendant then being resident without the limits of the village Berlin, to wit, at the town of Guelph, in the

county of Wellington, was the freehold owner of certain unoccupied lands, tenements, and hereditaments within the limits of the said village (comprising village and park lots, known and designated by certain numbers); and also of certain other lands &c. within the limits of the said village, all of which consist of part of lots three and four, and lot sixteen old survey township of Waterloo; in respect of which said lands the defendant was, according to the provisions of the statute in that behalf, liable to be rated and assessed for the said year 1854, in and for divers taxes or rates for public, county, village, and other purposes, chargeable upon, and payable out of the said lands &c.; and the said defendant being so liable, the said lands &c., were in the said year 1854 duly assessed and valued, and in respect thereof, the defendant being then resident without the limits of the said Municipality, was rated as a non-resident by the duly appointed assessors of the said Municipality &c. for the said year 1854, at certain sums for the actual and annual value of the said lands; which said lands, according to their numbers and designations and the said several sums at which the same were assessed and valued as aforesaid, were duly entered by the assessors for the said year in the assessment roll of the whole ratable property of the said village for the year, the value of such lands in the aggregate being £1110 9s., of all which premises due notice was afterwards given by the said assessors to the defendant, according to the statute in that behalf; and which valuation had not been appealed from or varied; and the plaintiffs say that by a by-law passed in the year our Lord 1852 by the Municipality of the County of Waterloo, £51 12s. 9½d. was imposed and directed to be raised out of the actual or annual value of the whole real and personal ratable property of the said village for the year 1854 next ensuing, for the purposes of the said County of Waterloo, and that by two other by-laws of the said county, passed in 1853 and 1854, the sum of £17 19s. 2½d. and £78 11s. 7½d. were imposed and directed to be raised as aforesaid, amounting together to £148 3s. 7½d.; and that afterwards, to wit, on the 1st of July 1854, it was notified to the clerk of the said village &c., that the said sum of £148 3s. 7½d. was to be raised, &c. as afore-

said : and the plaintiffs also say that by a by-law of the said village, passed the 17th of August 1854, it was enacted that two shillings in the pound should be raised and levied out of the whole ratable property within the said village, over and above the rate in the pound also leviable for county purposes aforesaid ; and that the clerk, as aforesaid, afterwards, according to the statute &c., made out the collectors' roll from the assessment roll of the said village in the said year 1854, and therein the several sums at which the defendant was assessed by the said assessors of the said Municipality for the said year 1854, in respect of the said lots &c., whereof the defendant was such owner as aforesaid, and the actual value of such lands, and the sum payable in respect of such lands &c., as well for the aforesaid rate of two shillings in the pound as for the sums required for county purposes as aforesaid, being five pence in the pound upon such property as for and in respect of a certain public rate of one penny in the pound for the Lunatic Asylum, were entered and do appear ; the whole amounting together to £111 10*d.* for the said village of Berlin, and £23 2*s.* 9½*d.* for the said county of Waterloo ; and £4 12*s.* 5½*d.* for the Lunatic Asylum—in the whole £138 16*s.* 1*d.*, payable by the defendant for the said year 1854 in respect of such lands owned by him as aforesaid ; and that such roll so made out as aforesaid, was afterwards, to wit, on the 30th day of September 1854, by the aforesaid clerk, delivered to Henry Eby, collector of the said Municipality of Berlin for the said year 1854, to be enforced by due course of law ; and that afterwards, to wit, on the 10th day of December 1854, the said Eby, while being such collector as aforesaid, gave notice to the defendant, who was and is resident without the limits of the said village, of the said several rates and sums of money so leviable out of and in respect of the said lands &c. of the said defendant, and demanded payment of the defendant thereof, according to the provisions of the statute in that behalf ; yet that the defendant hath not paid the same, or any part thereof, to the said collector, but wholly refused so to do. And the plaintiffs say that there was not any goods upon the said lots &c. or any of them, whereby the said collector could by distress have made the said several rates,

or any of them, according to the statute in that behalf provided, and the said rates have not since been paid, nor any part thereof, either to the plaintiffs or to the treasurer of the county of Waterloo, but the same remain wholly due &c.; by reason &c., and by force of the statute in that behalf, an action hath accrued to said plaintiffs to demand &c. •

Second count—For interest and account stated; judgment by *nil dicit*, and damages assessed at £14 18s. 10d.

In Easter Term, 18 Vic., *Wilson, Q. C.*, for the defendant, obtained a rule upon the plaintiffs to shew cause why judgment should not be arrested, on the following grounds, viz—1st, that the by-laws were not sufficiently set out in the declaration; 2ndly, that the plaintiffs cannot maintain the action; and 3rdly, that no action at all lies against the defendant; referring to Provincial statute 16 Vic. ch. 182, secs. 8 17, 22, 23, 40, 43, 45, 46, 48, 49, 50, 54, 55, 68, 72 & 75.

Gwynne, Q. C., shewed cause.

MACAULAY, C. J.—The statute 13 & 14 Vic. ch. 67. sec. 7, enacted that all lands should be assessed in the township, village, or ward, in which they lie, in the name of, and against the owner *if known*, and if he resides or has a legal domicile when the assessment is made within such township, village, or ward, or town or city in which it is included. But if the owner be not so resident or be unknown, then against the occupant, if occupied. Sec. 8: Unoccupied lands not known to be owned by any party resident in the township, town or city, &c., shall be denominated, “lands of non-residents”—see sec. 20. Sec. 11: Taxes how enforced. Sec. 17: Form and contents of assessment rolls, and schedule. B. Sec. 20: Lands of non-residents to be designated in a part separate headed “non-residents’ land assessments.” Sec. 37: When the party shall not be resident within the Municipality, or shall have removed out of the same; and see also statute 16 Vic. ch. 182, sec. 45.

It is said, as a reason against an action like the present, that if it lies after the time has elapsed for the return of the collector’s roll, it may happen that at the end of four or five years, when the rates have been increased ten per cent.

each successive year, the rates so increased may be levied by the county treasurer by distress of goods, should sufficient be found upon the lands, or if not, that a warrant may be issued to the sheriff to sell the lands for such arrears, while the plaintiffs were inconsistently prosecuting an action of debt to enforce the same principal rates or taxes with six per cent. interest instead of ten, and thereby causing a clashing of remedies which could not have been intended. But it does not follow necessarily that there must be such clashing, or that the remedy in *personam* by action, and against the land in *rem* may not be concurrent until the arrears are recovered by one mode or the other. The special remedies against the party would fail, if he was non-resident and had no distrainable goods within the county; the remedies against the land would continue, so that any goods afterwards found thereon might be distrained, or if not, the land might be sold; the only personal remedy that would remain against the party or his goods would be through the medium of an action.

Upon and after the 1st of January 1854 the assessment was regulated by the Provincial statute 16 Vic. ch. 182; sec. 1 enacted that all lands, to whomsoever belonging, shall be assessed in the township, village &c. in which they lie, and in the name of, and against the owner thereof if known, or if resident, or having a legal domicile or a place of business when the assessment shall be made, within such township, village &c. in which it is included, or if such lands be occupied by such owner, or wholly unoccupied; but if the owner be not so resident, unknown, or the land be occupied, it shall be assessed in the name of and against the occupant; and occupied land, owned by a party known or residing or having a legal domicile or place of business in the township, village &c. where the same is situate, but occupied by another party, shall be assessed in the name of and against both the owner and occupant, &c.

Section 8—That unoccupied lands not known to be owned by any party resident or having a legal domicile or place of business in the township, village &c. where the same are situate, or belonging to any party whose residence or domicile or place of business, upon diligent enquiry by any

assessor &c., shall not be found therein, or who, being resident out of the Municipality, shall not have signified to the assessors personally or in writing that he owns such land and desires to be assessed therefor, shall be denominated "lands of non-residents," and shall be assessed as thereafter provided.

Section 17—The assessors shall prepare an assessment roll, in which, after diligent enquiry, shall be set down in different columns &c. the names &c. of all the taxable parties resident in the township, village, &c., and of all non-resident freeholders, who shall either in person or in writing have required such assessor to enter their names, and the lands owned by them, in the roll, together with the description and extent or amount of property assessable against each, and containing the particulars in the schedule marked A. &c; provided always, that whenever any assessor shall enter upon his roll the name of any freeholder who shall have required his name so to be entered, he shall write opposite to it "non-resident," together with the address of such freeholder &c.

Section 22—That the lands of non-residents who have not required their names to be entered by the assessor shall be designated in the same assessment roll, but in a part separate from the other assessments, headed "non-resident lands assessments," in manner therein provided.

Section 23—That the assessor shall give notice to residents, and transmit by post to non-residents named in the roll, a notice, as therein directed.

Section 24—Rolls to be completed between the 1st of February and 15th of April.

Section 25—And the same to be delivered to the clerk of the municipality.

Section 26—Provides for an appeal by any person deeming himself wrongfully inserted on the roll, or overcharged &c. by the assessor &c., within 14 days after the time fixed for the return of the assessor's roll &c. And the roll as finally passed by the court of appeal &c., shall be valid, and shall bind all parties concerned, notwithstanding any defect or error committed in or with respect to such roll. Notices to

non-residents of the meeting of the court to be addressed to such party through the post office.

Section 28 gives a final appeal to the judge of the County Court. Sections 31 to 37 provide for the municipal rates. Section 39—The clerk of the municipality to make out collectors' rolls containing the names of the parties assessed &c. with amounts, under distributive heads, as therein provided, including public taxes under 13 & 14 Victoria, ch. 68, &c.

Section 40—The clerk to make out a roll of the lots &c. assessed against non-residents whose names have not been set down in the assessors' roll &c., and shall transmit the same to the treasurer of the county &c.

Section 41—The collector, on receiving the rolls, shall collect the taxes, calling upon residents &c., and if any person whose name appears on his roll shall not be resident within the municipality he shall transmit to him by post a statement and demand of the taxes charged against him in the roll, and the collector shall not receive any money on account of any lands not set down on his roll.

Section 42—If taxes are not paid after notice &c., the collector may levy the same by distress and sale of the goods, &c of the party liable, wheresoever found within the township, village, &c. So after one month he may distrain any goods upon the lands of non-residents on which the taxes inserted against the same on his roll have not been paid.

Section 45—If any party against whom any tax now is, or hereafter shall be assessed, in any township, village, &c., shall not be resident within the municipality, or shall have removed out of the same after such assessment and before such tax shall have been collected, or if any party shall neglect or refuse to pay any tax &c., assessed in any township, village &c., within the county in which he shall reside, &c., it shall be lawful for the collector, &c. to levy and collect such tax &c., by distress and sale of the goods &c. of the party assessed in any township, village &c. which for judicial purposes shall be within the same county, and to which such party shall have removed, or in which he shall reside, or of any goods, &c. in his possession therein; and if in every case the taxes payable by any party cannot be recovered in any

special manner provided by this act, they may be recovered with interest and costs, as a debt due to the township, village &c. in a competent court in this province, and the production of a certified copy of the collector's roll, &c. shall be *prima facie* evidence of such debt, and the taxes, &c. shall be a special lien on such lands, &c.

Section 46—The collector to return his roll to the treasurer of the township, village, &c., on or before the 14th of December in each year, or on such other day in each year as the municipal council of the county shall have appointed, not later than the 1st of March following, and pay over amounts collected &c.

Section 47—If any taxes mentioned in the collector's roll shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the township, village &c., treasurer, an account of all taxes remaining due on the said roll, shewing the reason why not collected, as a "non-resident"—"no property to distrain," &c.

Section 48—Commissioner of Crown Lands to return to the County Treasurer yearly, in January, a list of lands granted &c. during the previous year, and of all ungranted lands &c.

Section 49—The treasurer of each municipality shall, within fourteen days after the time determined, as before provided, for the return and final settlement of the collector's roll furnish the treasurer of the county with a copy thereof, so far as the same relates to all the lands of the municipality, with the sums paid and in arrear, &c.

Section 50—After the time when the collector's roll has been returned to the township, village &c., treasurer, no more money shall be received on account of the arrears then due by any officer of the municipality to which such roll relates, but the collection of such arrears shall belong to the treasurer of the county alone, who shall receive payment of such arrears, and of all taxes on lands of non-residents theretofore required to be returned, and certified to him by the clerk of the municipality, &c. Section 51—The treasurer of the county to enter in books kept for the purpose the lands on which the taxes remain unpaid; such books to be balanced yearly on

the 1st of May, &c. Section 53—Arrears to be increased ten per cent., &c. Sec. 54—If any distress shall be upon the lands of non-residents in arrears for the taxes, the county treasurer may issue a warrant to the sheriff to levy the amount of any goods, &c. found on such lands &c., in the same manner as provided in secs. 42, 43 and 44.

Sec. 55—Whenever a portion of the tax on any land has been due for five years, the treasurer of the court is to issue a warrant to the sheriff.

Section 57—Who shall proceed to sell such lands, &c., as therein provided. Section 58—If no distress, &c.

Section 68—All moneys received by the county treasurer on account of taxes on non-resident lands in any municipality in the county, whether the same be paid to him directly or levied by the sheriff, shall constitute a separate fund, called "The non-resident land fund," and an account shall be opened with each municipality with the said fund.

Section 69—All arrears to form one general fund, &c.

Section 84—Monies collected by the township, village, &c. collector for county purposes, &c. are to be by him paid to the treasurer of the municipality, and by him to the county treasurer, &c.

18 Vic. ch. 21—When a collector of any municipality may have heretofore failed or omitted to collect the taxes mentioned in his collection roll, or any portion thereof, by the 14th of December (or by such other day in the year for which he may have been, or may hereafter be collector, or as may have been, or may hereafter be appointed by the municipal council of the county, it shall and may be lawful for the council of such municipality to authorize and empower by resolution the said collector, or any other person in his stead, to continue the levy and collection of such unpaid taxes, in the manner and with the powers provided by law for the general levy and collection of taxes, provided nothing therein contained shall be held to affect the duty of the collector to return his collection roll, or to invalidate or otherwise affect the liability of the collector or his securities in any manner whatever.

I do not see that any remedy except by action remains

to enforce payment of taxes imposed upon persons assessed in respect of personal property only, who may have left the county, or against whom no distress of goods can be legally levied, and such action is vested in the municipality by the 45th section of the act 16 Vic. ch. 182.

Then, as to rates due upon lands of non-residents: I see no good reason why an action is not maintainable by the treasurer of the county in the name of the village municipality, after the collector's return has been made, or by the collector in the same name during the existence of his authority, if the non-resident party requested his name to be inserted on the assessors' roll. In the present case the action may have been instituted by the collector before his authority ceased—that is, if it was extended to the 1st of March, or continued under the statute 18 Vic. ch. 21, or by the county treasurer afterwards; but in either event the proceeds would, I suppose, go to the county "non-resident land owners' fund," and be paid to the county treasurer; but that is a question not necessarily calling for discussion at present. But it is not alleged that the defendant's name was inserted on the collector's roll at his request; if a non-resident, and he did not request it, a question arises whether he could be assessed personally at all. That his name was entered in the assessors' and collector's roll is averred, and it must be intended that it was so entered either at his request or because he was known to be the owner, and therefore entered as a non-resident; and if he was such owner, and his name appears to have been legally entered, I think the taxes became a debt under the 45th section, and that a right of action vested in the plaintiffs whenever it turned out that the rates could not be realized by any of the special modes pointed out in the statute in that behalf; the special modes were, I think, prompt remedies by distress and sale of goods, &c., if found within the municipality, in some cases, as of non-residents, or within the county in others. That special manner in the 45th section is equivalent to a summary manner, and that the power to the county treasurer and sheriff to sell the lands at the end of five years is not included; if it were so, no action could be brought during the collector's time for taxes rated against

lands, nor afterwards, until the land had been sold, and a deficiency still remained. It is contended no action like the present can be brought in the plaintiff's name after the collector's roll has been returned or his powers have ceased; and if not, it proves that a sale five years afterwards is not included in the special manner provided by the act; but the statute shews that the taxes as a debt might accrue against the owner of lands whenever the special manner failed. A remedy by distress would not necessarily fail during the collector's time—see section 54; and a lien upon the lands is expressly declared at the end of the 45th section. The language of that portion creating the debt is very comprehensive; it says, if in any case the taxes payable by any party cannot be recovered in any special manner provided by the act, they may be recovered, with interest and costs, as a debt due to the township &c., in a competent court in this province. It seems to me reduced then to the consideration whether it sufficiently appears that the defendant was by name duly rated for these lands as a non-resident—Section 7 authorizes such entry if the owner is known, or (secs. 8, 17 & 38) required by him in person or in writing. If it could be intended that the entry was at defendant's request, there would be an end of all question on this head; still, if known to the assessor, and entered and notified accordingly, and the roll containing such entry became final in the absence of an appeal (and none appears to have been made) under secs. 26 & 28. There is a want of consistency in the statute unless the word *or* in section 7 be read *and*; one section speaking of owners known, and others of non-residents requesting the insertion of their names, and in some instances it is said the word *or* may be read *and*, to fulfil the obvious intention of the Legislature.

When a rule is moved to arrest judgment after a judgment by default, the intendments are not made as after verdict, but as upon general demurrer; but the declaration states, and the default admits, that the defendant was in fact entered on the roll and rated for the lands mentioned, and according to the maxim, *omnia præsumuntur, rite et solenniter esse acta, donec probetur in contrarium*—everything is presumed to be right and

duly performed until the contrary is shewn. It is clear, on the face of the declaration, that the defendant was not resident within the village of Berlin, and it is alleged under a *videlicet* that he was resident in Guelph in another county; as a non-resident he may have in fact resided in the county of Waterloo, or elsewhere in Canada, or in any other part of the world, than Guelph; the substance of the averment is, that he was not resident within the Municipality of Berlin, in which the lands in question are situate, but being known to be the freehold owner, he was entered and rated therefor, as such non-resident, either at his own request or because known; whichever way it was, I think that after notice of being so rated by the assessor, and demand of rates by the collector, his acquiescence, if not his previous request, must be presumed, else the roll is not final in the absence of any appeal. According to section 26, if defendant was improperly assessed, he ought to have appealed, and not silently acquiesced therein until this action was brought, and then to suffer judgment by *nil dicit* to be entered against him. In my opinion the action well lies, and the money when recovered should be paid by the plaintiff to the county treasurer, or if paid to the plaintiffs, they can only recover it to the use of the county, and will be bound to pay it over to such treasurer, or to account to the county accordingly. The plaintiffs' name is only used to enforce payment for the benefit of the county treasury, which in its turn is bound to account to the village municipality (see section 68, 69, 84), unless the late statute 18 Vic. ch. 21 varies the effect of the former statutes on this head, which is not at present material to be considered. The objection that the by-laws referred to in the declaration were not sufficiently stated or set out, was not supported by authority; and the collector's roll being made *prima facie* evidence of the debt by section 45, I do not suppose any objection on that head can be sustained.

McLEAN, J.—By the 16th Vic. ch. 182, the former acts, 13 & 14 Vic. ch. 67, and 14 & 15 Vic. ch. 110, are repealed, except in so far as the same may affect any rates or taxes of the

then present year, or any rates on taxes which had accrued and were then actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by that act. And it provides that all taxes of the then present year and all arrears of other taxes remaining due after that act shall come into force (1st January 1854) shall be collected and recovered according to the provisions of that act.

The rates for which this action is brought were for the year 1854, some of them payable under by-laws of previous years, and some for municipal purposes of the county of Waterloo, or the village of Berlin, under by-laws of that year. The remedy for the collection of such rates must be under the act 16 Vic. ch. 182; and unless the 45th sec. of that act confers upon the plaintiffs the right to sue the defendant for such rates, this action on the first count cannot be sustained. By the 7th section of that act it is provided that all lands, to whomsoever belonging, shall be assessed in the township, village or ward in which they lie, *and in the name of and against the owner thereof if known*, or if resident or having a legal domicile or place of business when the assessment shall be made, within such township, village or ward, or if such lands be occupied by such owner, or wholly unoccupied, but if the owner *be not so resident or be unknown*, or the lands be occupied, it shall be assessed in the name of and against the occupant; and *occupied land owned by a party known or residing or having a legal domicile or place of business in the township &c., where the same is situate, but occupied by another party, shall be assessed in the name of both the owner and the occupant*, and the taxes thereon may be recovered from either.

From the terms used in this section, it is contended that lands may in all cases be assessed against the owner if known, and his *name* may be on the assessment roll as the owner; but it is clear to me that the clause was not intended to give that authority to an assessor. Such a construction is wholly at variance with the provisions of the eighth section and all the other provisions of the statute; and, according to my view,

the true interpretation of the clause is to limit it in its operation to persons known to the assessors *within* the *township* or municipality. It cannot have been intended by the legislature to allow an assessor to put down upon his roll, perhaps without enquiring, and generally without the means of knowing unless by hearsay, who the owners of the property are, the names of individuals as owners to whom common rumor may have assigned the ownership of land. It is not to be imagined, contrary to the express provisions of the very next section of the act, that it was intended by the legislature to give to the assessors the right, upon their own view of the ownership of lands, to put them down upon their roll as the property of an individual, resident in another and perhaps a distant part of the province, and thus throw upon such individuals the costs of an appeal or perhaps of an action like the present, in which the production of a copy of the roll is declared to be evidence of the debt.

By the 8th section it is enacted that unoccupied lands not known to be owned by any party resident or having a legal domicile or place of business in the township, &c. where the same are situate, or belonging to any party whose residence or domicile, or place of business, on diligent enquiry, should not be found *therein*; or who, being resident out of the municipality, shall not have signified to the assessors personally or in writing that he owns such lands and desires to be assessed therefor, shall be denominated "lands of non-residents," and shall be assessed in manner thereafter provided. Then by the 22nd section of the same act it is enacted that the lands of non-residents who have not required their names to be entered by the assessors shall be designated on the *same* assessment roll, but in a part separate from the other assessments, headed, "non-residents' land assessments," &c.; it prescribes the mode of proceeding in entering such lands on the roll. The plain intention of these provisions appears to me to be that the name of any resident owner of land, or of any owner who may have required his land to be assessed, may be entered on the assessment roll; but that in all other cases the lands shall be entered and rated as the "lands of non-

residents;" in which latter case the land only, and not the owner personally, would be liable for the amount of rates, if the amount did not exceed the value of the lands.

By the 46th section every collector is bound to return his collection roll to the treasurer of the municipality, and to pay over the amount by the fourteenth of December in each year, or such other day, not later than the 1st of March next following, as the municipal council of the county shall have appointed. The power of extending the time for the return of the collectors' rolls and the payment of monies collected is not given to the municipal council of each township or village, but belongs exclusively to the municipal council of the several counties; so that, without such authority expressly derived from the County Council of Waterloo, the collector for the Municipality of Berlin could not move in making any collection on his roll after the 14th of December 1854, and it is not alleged in the declaration that any such authority was at any time given. We must then assume that the collector's roll was duly returned on or before the 14th of December 1854, and that, in pursuance of the 47th section, the collector put down opposite to each separate assessment the amount of which was not collected the reason why he could not collect the same, by inserting in each case the words "non residents" or "no property to distrain." And we must also assume that, in order to obtain credit for the amount of uncollected rates, the collector made oath as required by that section of the sums remaining unpaid, and that no distress could be found from which the same could be collected. All this having been done, then the 50th section declares that "*no more money shall be received on account of the arrears then due by any officer of the municipality to which such roll relates, but the collection of such arrears shall belong to the treasurer of the county alone, and he shall receive payment of any such arrears, and of all the taxes on lands of non-residents required to be returned to him by the clerk of each municipality.*" By the 53rd section, a sum of ten per cent. is to be added yearly to any arrear of tax due upon any parcel of land by the county treasurer. And if at any time within five years sufficient distress can be found on the lands of

non-residents, the county treasurer may authorize the sheriff to levy therefrom the amount of arrears. But if not so collected, and remaining due for five years, the same may be levied by a sale of the lands. All these provisions must be nugatory, and the express prohibition contained in the 50th clause against any officer of a township or village municipality receiving money after the return of the collector's roll must, as it appears to me, be wholly disregarded, if it be held that the plaintiffs can maintain this action and thus oust the county treasurer from the exercise of a power which the statute gives to him alone. If the plaintiffs can maintain this action against the defendant, admitted to be, not only non-resident within the village of Berlin, but admitted not to be resident in the county, then the treasurer of Berlin, an officer of the municipality "to which the collector's roll which was given in evidence relates," must be entitled to receive the money from the sheriff when collected, though expressly prohibited by the 50th section from receiving any money whatever after the return of the roll. It cannot be argued that no return of the roll has been made; without such return it could not be known that any taxes were in arrear; but under any circumstances it does not rest with the plaintiffs to deny such return: they allege that the rates were demanded; that there was no distress on the premises; that the rates *were not paid* to the collectors, and that they *remain due*; from all which facts, and from the time for the return of the roll having long passed before this action was brought, it must be taken that the collector and the Municipality of Berlin have become *functus officio* and incapable of acting in the further proceedings for the collection of the arrears of the rates. On these grounds, I am of opinion that the first count of the declaration in this case does not shew a sufficient, or any ground of action, and that if no other cause of action were stated in the declaration, the judgment must be arrested. But, as the second count does set out a good cause of action, and the assessment of damages is on that count as well as on the insufficient count, judgment cannot be arrested, but a *venire de novo* must be ordered. It is manifest to me that the plaintiffs are proceeding for arrears of rates only, and are attempting to

exercise a power which in my judgment does not belong to them. I think therefore the defendant is entitled to be relieved from an action to which he clearly is not liable.

RICHARDS, J.—There can, I apprehend, be no doubt that *prima facie* if defendant's name appears on the collector's roll of the municipality, charged with the rates on certain lands, he is liable to pay those rates. If he was not satisfied with his name appearing there, he could apply to the Court of Revision to correct it. We must assume that his name was inserted on the roll at his own request; and this having been done, he is, as to the collection of the taxes rated against him, to be treated very much as a party who was resident at the time of the assessment, and had removed from the county before the taxes were paid. The question arising in the case which seems to me to create the greatest difficulty is, whether the plaintiffs can sue the defendant for these taxes as a debt due to the village, "without first endeavoring to recover the same by sale of the lands—or in other words, if that is a *special manner* intended by the act, which must be resorted to for the collection of the taxes before they can be sued for as a debt." It is in effect admitted from the statement in the declaration, that these taxes could not have been recovered by distress of the defendant's goods before this action was brought, there not having been any goods on the lands on which the taxes were due from which a distress could have been made.

I do not think it is the intention of the act to give to the county treasurer any power to collect or receive any taxes but those due on *lands*—whatever taxes are due from personal property or income may, I think, after the special remedy provided by the act for their collection (that is, want of personal property out of which to make a distress) has failed, be sued for as a debt due the municipality, and collected with interest. The section provides that all taxes accrued or to accrue on *any land*, shall be a special lien on such land. It does not say that taxes due on personal property shall create such a lien. The ten per cent. annually to be added to the arrears of taxes on each piece of land,

seems to be in lieu of interest, and to cover the expenses attendant on keeping the accounts and other charges incident to managing these matters, which seem to relate only to taxes due *on land* throughout the whole statute; and section 69, which relates to all arrears of rates chargeable on lands, requires each municipality, in paying over any school or local rate, or its share of the Lunatic Asylum tax, or of any county rate, to supply any deficiency arising *from the non payment of any tax on land* out of the general funds of the municipality; and it is further provided that the several municipalities shall not be answerable for any deficiency arising from abatements or inability to collect any tax on personal property. After going carefully through the statute and considering its scope and tendency, I come to the conclusion that with regard to taxes on lands they cannot be collected by action, until it is ascertained that the amount cannot be recovered by sale of the land, which I conceive to be a *special manner* pointed out by the act for such recovery. On the whole, then I think—

- 1st. That a non-resident owner of land can only be properly rated on the assessment roll of the municipality in his own name, when he requests to have his name entered on the roll:
- 2nd. That when the name of a non-resident appears on the roll, it must be presumed that it has been entered there at his request:
- 3rd. That having failed to recover the tax as to personal property of any person rated on the roll for want of property to distrain, the amount of such tax may be recovered, with interest, as debt due to the municipality:
- 4th. As to taxes due on any *lands*, that they cannot be sued for as a debt due to the municipality until after they have been five years in arrear; and on a sale of the lands, the amount of the taxes cannot be recovered in that special manner provided by the act. It is scarcely probable that five years of arrears of taxes, with the expenses, &c., on land in this country, would fail to be recovered by a sale of the land itself. It is provided by section 70 that the whole of the debentures to be issued on the credit of the non-resident land fund shall not exceed two-thirds of all the arrears then due upon the lands in the county and other sums at the credit of the fund. At the end of four years 40 per cent. at

least would be added to the amount of the taxes, and debentures might be issued based on that data. At that time, if, instead of pursuing the remedy against the land whereby the increased amount above the interest could be collected, the party named on the roll could be sued, then all that would be recovered from him would be the taxes with 6 per cent. thereon, and the non-resident land fund would be diminished by at least 16 per cent. of the amount due by such party. If it be admitted that the municipality of a village or township may at any time sue for taxes as a debt due the municipality, then this anomaly may take place—the sheriff may be required to seize the property of the defendant in the suit under an execution in favor of the municipality, and at the same time the county treasurer, under the 54th section of the act, may issue his warrant to levy the arrears, (including the 10 per cent. annual increase) by distress on the land: these two remedies may be pursued at the same time. If the amount is levied under the executions (and that is to be considered as satisfying the claim,) then the municipal loan fund loses the additional 4 per cent. per annum above the 6 per cent. interest. Then how is the sheriff of the county where the land lies to know if the amount has been made under an execution against the owner of the land, or how is he to know that the taxes have been sued for? In whatever light it is presented, taking this view of the matter, it seems to me we are involved in difficulties from which we cannot escape. But, taking the statute as I have already said I thought it should be construed, we avoid all these difficulties and make the different sections of the act and the remedies thereunder given, harmonize.

Per Cur.—Rule absolute.

TOWNSEND V. HAMILTON.

Sheriff, seizure by—New trial.

In an action against a sheriff who was indemnified, and who had taken but little trouble with the defence, the court set aside a verdict for a large amount for the plaintiff on the grounds of the discovery of new evidence, the confiction of evidence at the trial, excessive damages, &c. on payment of costs, with leave to plaintiff to amend.

Semble—That in such an action, when there is conflicting evidence as to the plaintiff's right to recover as to a part of the goods seized, the court will grant a new trial to the plaintiff on payment of costs, he restricting himself to such goods alone at a future trial.

Writ, 15th December, 1853. Trespass for seizing saw-logs, timber, chains, and converting, &c.

Pleas—Not guilty, per statute. Second—not plaintiff's goods. The goods were seized by defendant as sheriff, &c., under a writ of attachment at the suit of one Collins against the effects of one Frederick Smith, and plaintiff claims them to have been his. To prove title, plaintiff put in evidence a sealed agreement, dated the 1st December 1851, whereby William Haran, Benjamin Haran, and Elijah Wm. Haran, sold to plaintiff all the pine trees standing and fallen on the south 100 acres of lot No. 119, east Township of Bayham, south on the Talbot road, with authority to him and agents, &c. to enter within three years to cut and carry away, &c. in consideration of \$1000, to be paid \$500 on or before the 1st July then next, and the residue on or before the 1st January 1853. It is signed and sealed by Wm. Haran, and by B. Wm. Haran, not by Elijah Haran, but by D. J. Townsend, per F. Smith—witnessed by J. M. Bull—a blank receipt for \$390, not signed. To shew authority in F. Smith, a power of attorney under plaintiff's hand and seal was put in, dated 1st December, 1850, in words written, "with no additional year nor any full stop," and witnessed,—O. H. Marshall, appointing Frederick Smith of Vienna, Canada, his attorney, to enter upon a certain 100 acre lot, the timber on which had been sold to him by W. Haran in Bayham (no number), and to cut all the timber thereon, and to ship the same to Black Rock. The power of attorney is very comprehensive in relation to the management of plaintiff's lumber affairs in Canada. The plaintiff resided at Black Rock, U. S.; Frederick Smith, at Vienna in Canada. The timber in question was at Port

Burwell. The plaintiff gave evidence sufficient *prima facie* to establish his title, and he proved the seizure &c. His title was not impeached on the defence, but the attachment against Smith was admitted; it was issued out of the county court. The plaintiff also gave evidence of quantity, loss, value, &c., and the jury found for the plaintiff, £488 15s.

Rule *Nisi* to set aside verdict, &c., on the grounds of surprise, and on grounds disclosed in affidavits filed, and for excessive damages on affidavit of Collins of the discovery of material evidence since the trial, and of his ability to prove many material matters impeaching plaintiff's title if a new trial is granted.

Dalton, for plaintiff, shewed cause by affidavits in reply, conflicting with the statements contained in Collin's affidavit, and supporting his own title as *bond fide*.

Dr. Connor replied, and relied upon the discovery of new evidence as sufficiently shewn in Collin's affidavit to entitle defendant to relief; he also remarked upon the discrepancy in the dates and contents of the power of attorney from defendant to Frederick Smith and Smith's contract for the timber, neither of which were proved by the subscribing witnesses, who might have been produced. He urged that though indemnified, defendant was not so indemnified to the amount of the verdict, and that both he and Collins were taken by surprise. That in favor of public officers and *bond fide* creditors, the court would be disposed to grant relief; and he urged strongly for a new trial on terms, the merits not having been investigated or understood at the last one.

MACAULAY, C. J.—This case is felt to be attended with much difficulty so far as respects the propriety of granting the relief prayed. There is room to apprehend that the defendant on the record, being indemnified by Collins, took no trouble in defending the suit until he found a larger verdict rendered against him, and that Collins strangely neglected to attend to the defence, being in effect the real defendant.

Under such circumstances, we are pressed to relieve against a verdict correct on the evidence given at *Nisi Prius* upon

affidavits containing much matter calculated to impeach such verdict; among other grounds, the discovery of evidence is relied upon.

Perhaps no one ground is of itself sufficient to sustain the application; but referring to the notes of evidence and the exhibits filed—especially the power of attorney and deed of sale, neither of which were proved by the subscribing witnesses; and comparing and considering the bearing of the whole in connection with the matters contained in the affidavits, we are so far impressed that the merits of a suit involving a large sum of money have not been fully or satisfactorily investigated, that, although it is deviating from the strict course and going the utmost length in favor of the application, we do not feel that we could satisfactorily confirm this verdict and refuse another trial on payment of costs on or before the 5th of October next, with leave to the plaintiff to amend his declaration in relation to the special damage respecting the steamboat, if so advised.

This case was tried again before *Draper, J.*, when the jury returned a verdict for defendant; and in Easter Term, 18 Vic., *Vannorman* for plaintiff, obtained a rule on the defendant to shew cause why it should not be set aside as being contrary to law and evidence, and the judge's charge.

Connor, Q. C., shewed cause.

MACAULAY, C. J.—We have carefully examined the notes of the learned judge who last tried this case, and cannot find sufficient evidence to warrant the verdict against the plaintiff as respects the timber that was obtained off the south 100 acres of lot 119, township of Bayham, south of Talbot road. Whether Smith had a power of attorney or not, the evidence on both trials went to establish that the Harans did, by instrument under seal, bearing date the 1st December, 1851, sell to the plaintiff all the pine timber standing or fallen upon the said 100 acres of land. The power of attorney given in evidence has not been satisfactorily connected with the transaction; although twice offered in support of this sale to, and purchased by the defendant, it is now stated to have been in fact given for other purposes and objects.

The obscurity in which this part of the case is left is calculated to operate unfavorably upon the plaintiff's case, and it will be for him at another trial, should another take place, to shew satisfactorily when, where and under what circumstances it was executed, and with what objects, consistent and receivable with its import. There is some confusion and want of consistency in the evidence given at the different trials had in relation to this matter.

The present case was first tried before myself in the spring of 1854, at which time Benjamin Haran was examined as a witness and alleged that he was the real owner of the trees upon this half lot, and that he sold the same to the plaintiff by the instrument above mentioned, his father and brother being joined for the better satisfaction of Frederick Smith, the plaintiff's agent, and that he had been paid therefor by the plaintiff. At the autumn assizes in 1854 two cases of Wm. Haran the father against the present plaintiff, one in assumpsit upon a promissory note for £100, and the other in covenant upon a contract of sale like the present, but apparently of trees &c. on lot No. 118, were tried before the Chief Justice *Sir J. B. Robinson*, in both of which a verdict was rendered for the defendant, in which case Benjamin Haran was also examined as a witness for the therein plaintiff. At the last trial of this case Benjamin Haran was not called as a witness, but Wm. Haran was examined, and alleged that the trees and sale upon south half of 100 acres of lot 119 were his, and that he had not been paid by the plaintiff, whereas he was probably alluding to another sale made by him of trees upon lot No. 118, and not on the south 100 acres of 119. Benjamin Haran has been consistent in his statements when examined on the subject. On the last trial the learned judge felt the case not to be a satisfactory one, but expressed his opinion in favor of the plaintiff. On the evidence given as respects so much of the timber in question as was cut off the south 100 acres of lot No. 119, and the right of property in the residue, he left to the jury, who rendered a general verdict for the defendant. We do not see our way with sufficient clearness to confirm such finding, but think the weight of evidence so far

preponderated as to render it proper to grant another trial as to the timber taken off lot 119 under the sale of 1st December 1851. It cannot be said the verdict was against evidence, for the series of transactions between the plaintiff and Smith rendered Smith's relation and position equivocal, and created doubts whether he was not in fact the real principal purchaser.

Whether contracting as the plaintiff's agent, for all the timber about which the suit was brought, as to all but that cut off lot No. 119, south 100 acres, we are satisfied to let the verdict rest, but are disposed to grant a new trial on payment of costs as to the timber got off the south 100 acres of 119 under the sale in evidence, upon condition that the plaintiff undertakes to restrict himself at any future trial to such timber alone, and upon payment of costs. It is said to be the principal part of the timber in question, and if so the effects of this rule may be to grant a new trial for the substantial objects of this action; however that may be, we think we ought so far to re-open it upon the terms above expressed, and make absolute the rule for a new trial, qualified accordingly.

McLEAN, J., and RICHARDS, J., concurred.

WM. LOSEE V. ELLEN KEZAR, ADMINISTRATIVE OF
ALVIN KEZAR, DECEASED.

Improvements—Parol evidence.

A. by memorandum of agreement leased to B. a certain farm for four years, which B. agreed to work, &c., and if said A. sold the farm, he B. would give up possession thereof in three months after receiving notice from said A., who, before his death, sold to C., from whom B. leased, and brought an action against the administratrix of B. for repairs done on the farm during A.'s life time, alleging that there was a verbal agreement that such improvements should be paid for by A.

Held, that such action was not maintainable, there being no stipulation in the lease as to improvements, and that plaintiff could not qualify or add to the written instrument.

DECLARATION. First count alleges that in consideration that Alvin Kezar had leased to plaintiff a certain farm and premises for four years, for certain rent to be paid by plaintiff, he, Kezar, promised to pay plaintiff the value of any improvements he should make on said farm during said time, provided plaintiff should be deprived of the occupation

of the farm and premises at any time before the expiration of the said term. Plaintiff avers that, confiding in the said promise, he, during a part of the said time, did make divers large improvements on the said farm, to wit, 500 panels of fence and two bridges of great value, to wit, £50, and did otherwise make improvements on the farm; and he further says that, before the expiration of said time, to wit, on 1st July, 1853, he was deprived of the occupation of the said farm and premises, and was forced to surrender the same; and thereupon Alvin Kezar, in his lifetime, became liable to pay the said sum of £50 to the plaintiff.

Second count—for work, labor and materials, done, performed and provided, by plaintiff, for Alvin Kezar, in his lifetime and at his request, alleging promise by Alvin Kezar in his lifetime. Breach, that Alvin Kezar in his lifetime, and defendant, as administratrix since the death of the said Alvin Kezar, have disregarded the said promise, and neither of them have paid the said sum of money, to the plaintiff's damage of £50. The defendant pleads, first, non-assumpsit by Alvin Kezar; second, as to the first count, that plaintiff did not make said improvements *modo et forma*.

Third—As to first count, that plaintiff was not deprived of the occupation of the farm and premises *modo et forma*.

Fourth—Set off as to £17 11s. 2d. by judgment in the Fourth Division Court of the United Counties of Stormont, Dundas and Glengary, recovered by Alvin Kezar in his lifetime against plaintiff, on 29th February, 1854, and in £50 for goods sold, &c.

Fifth—*Plene administravit*.

Sixth—Outstanding judgments and no assets further. *Replication*, taking issue on first, second and third pleas; as to fourth plea, never indebted, &c.; as to fifth and sixth pleas, *takes judgment*.

The cause was taken down to trial before *Richards, J.*, at the Spring Assizes for 1855 for Stormont, Dundas and Glengary. A memorandum in writing, not under seal, between plaintiff and Alvin Kezar, dated 18th September, 1851, was produced at the trial and the signing of it proved, whereby Alvin Kezar agreed to lease and farm let to

plaintiff, for four years from the date, the farm known as the Stoneburner farm, in the first concession of Osnabruck, with the farm house, barn and outbuildings, on said farm. Plaintiff agreed to work the farm in a good husbandmanlike manner during the time he occupied the farm; and he further agreed to quit possession at the time stated, and to leave the house in as good repair as it then was; and further, if the said Alvin Kezar sold the said farm, he, plaintiff, agreed to give up quiet possession in three months after receiving notice from the said Alvin Kezar to leave the farm. Kezar agreed to furnish two sufficient horses, one double waggon and sleigh, and one double harness, which were to be given up in as good order as they then were, allowing for fair wear and usage. Losee further agreed to deliver to the said Alvin Kezar one half of all grain raised on the farm, measured with the half bushel, and also one half of the hay; the horses to be used solely in working on the farm. It further appeared in evidence that Alvin Kezar, before his death, had sold the farm to George Crawford, Esq., of Brockville, who leased it by agreement, not under seal, to plaintiff, for four years from 1st March, 1855, at £30 per annum, £20 in cash and the other in fencing, at a fair valuation.

After proving the first-mentioned document, plaintiff proposed to prove that at the time the agreement was made there was a further understanding that plaintiff was to be paid for any improvements he might make on the place during the tenancy, in case he was obliged to give up the premises before the expiration of the four years. The learned judge refused to admit this evidence. Plaintiff then called his son, a young lad, who stated that Kezar, about the 17th October, 1853 (year before last), came to plaintiff's house and said he would pay him for his improvements, as he had to leave the place before his time was out.

Evidence was offered to shew that the improvements on the place were worth £40, that plaintiff held from Crawford from March or April 1854, and that Alvin Kezar died in April 1854.

Mr. *Pringle*, for defendant, objected: First—That there was no evidence to support a promise by Kezar; that if the

statement of plaintiff's son was correct, there was no consideration for the promise; that it was *nudum pactum*.

Second—That there having been a written lease between the parties, no mere parol statement or promise could be shewn to vary the effect of the written lease.

The learned judge intimated that he would take the opinion of the jury as to whether there was any promise or agreement made by Mr. Kezar to pay plaintiff for the improvements, subject to the opinion of the court on the points raised for defendant by Mr. Pringle.

Mr. *Pringle* then, on behalf of defendant, proved the Division Court judgment in the suit *Pringle v. Losee*, for debt and costs £17 11 2
The jury found for plaintiff 22 8 10

Allowing plaintiff for his improvements..... £40 0 0

The facts were proved by a memorandum of agreement in writing, dated the 18th September, 1851, whereby the intestate leased to plaintiff, for the term of four years, a farm in the township of Osnabruck, therein mentioned, which plaintiff agreed to work in a good and husbandmanlike manner during the time he occupied the same, and to give up quiet possession at the time above stated, and to leave the house in as good repair as it then was; and if said intestate sold said farm, plaintiff agreed to give up quiet possession in three months, after receiving notice from said intestate to leave it. Intestate agreed to furnish a team, &c., and plaintiff agreed to deliver to said intestate one half of all grain raised on the farm, and half of the hay. The judgment for £17 6s. 8½d. proved.

There was a copy of proposals by Crawford to plaintiff, dated 15th February, 1855, for leasing said farm to him for four years, from 1st March, 1855, at £30 a year, £20 in cash on 1st February yearly, and £10 to be let out in good fencing at a fair valuation. Plaintiff to take off no timber not wanted for the use of the farm, &c., and restore possession at the end of four years, paying the rent yearly on the 1st February. At the bottom of the paper, plaintiff agreed to take the property on these terms.

Verdict for plaintiff £22 8s. 10d.

Rule Nisi to set it aside and enter it for defendant, on leave reserved: the judge's notes state the verdict to have been taken, subject to the opinion of the court.

MACAULAY, C. J.—The lease contains no stipulations respecting compensation for improvements in the event of the plaintiff's lease being determined during the term by reason of a sale of the estate, and the alleged promise afterwards seems to want consideration to support it. It does not appear that the plaintiff was deprived of the occupation of the farm although he did attorn to, and afterwards took a new lease from or held under Crawford, the assignee of the reversion. The claim set up is not provided for in the lease from the intestate, and is therefore inconsistent with it; and it is contrary to the authorities to qualify or add to the written instrument by parol evidence, of other or additional provisions made concurrently and involved in the same transaction.

MCLEAN, J. and RICHARDS, J. concurred.

Rule abolished.

SAMUEL PETERS V. ARTHUR WALLACE.

Libel, action of—New trial.

In an action for libel, published in a newspaper, against the plaintiff, in his professional capacity as town engineer of, &c., where a verdict was rendered for the defendant on evidence preponderating greatly in the plaintiff's favor, the court set aside such verdict and granted a new trial on payment of costs.

CASE for libel.

In a newspaper, the *London Times*, of and concerning plaintiff as a civil engineer, employed as such by the town council of London—words

“And as regards the town hall, he (plaintiff) may very fairly claim to have assistants, for it is a well known fact that he knows nothing of architecture.”

Again: “Sir, the next question I would ask is, how is it that pretty nearly all the competent contractors who have resided in the town for years are deprived of contracting for public works? This is a question easy to answer. Look at the stringent specifications got up by the engineer (plaintiff), to suit his own purposes and those of his nearest friends. It is a very easy matter for those who are favorites with the

engineer (plaintiff) to work to any specification, no matter however stringent it might be. The contractors can afford to contract for work (public works) much cheaper than others, and get rich; whereas other contractors might be ruined by the engineer (plaintiff) acting up to the letter of the specification. This is the way that the engineer (plaintiff) has managed to drive off most of the competent contractors, and to get others that suit his own interests better. There is more manoeuvring in this matter than most people are aware of."

Again: "It is generally reported that the engineer (plaintiff) has been in the habit of opening tenders for ('public works, town of London,') at his own discretion. If this be correct, it is only but right that an exposure should take place, as it is anything but fair play; at the same time, he (plaintiff) having a brother a contractor. Inuendo, that plaintiff opened tenders to inform his brother and enable him to offer at lower prices."

Again: "I am informed, from a good authority, that the sewers which have been built by the engineer's (plaintiff's) brother are very imperfect, owing in general to the number of bad bricks that have been put into them. To give the public an idea of this, it is necessary for me to state that a large quantity of bricks which the engineer (plaintiff) condemned and refused Messrs. Wallace and Schram (defendant and Peter Schram) to put into the sewers which they built, were afterwards actually considered good enough by the engineer (plaintiff) when his brother had got sewers to build, and were without hesitation put into them. This is the way the engineer (plaintiff) may have pocketed hundreds of pounds. Had the town employed a competent person to look over the sewers, and had such men as Messrs. Wallace and Schram been at the building of them, this evil would have been remedied. With a long inuendo, that defendant intended to impute corruption, collusion, speculation, &c., with his brother as a contractor."

Pleas. First—Not guilty to the whole.

Second—To the first words stated, that plaintiff did know nothing of architecture, &c., and so justifying.

Third—As to the words second (No. 2), justification, alleging the truth of what is stated.

Fourth—As to the words No. 3, true, &c. .

Fifth—As to the words No. 4, true, and justifies, &c.

Replications. Similiter to the first plea, and *de injuria* to the residue, and issues.

At the trial, it was admitted that defendant published the

libel, and that the plaintiff was town engineer of London and the libel published of him as such.

The defendant then gave evidence in support of his pleas of justification, and the plaintiff gave evidence to rebut the same.

Being left to the jury, they found for defendant.

This is a rule nisi to set aside such verdict; against which it is contended that new trials are not granted in actions for libel.

MACAULAY, C. J.—It is to be observed that this is a case in which the defence was not rested upon the question, whether the publication was made in fact, nor whether it was libellous or not. But both being admitted, the defendant relied upon the special pleas of justification. It is not therefore a case in which the jury can be taken to have expressed a deliberate opinion that the words were not published, or, if they were, that the words published do not constitute a libel.

As justified by the special pleas, I think the weight of evidence, though there was some conflict, preponderated greatly in the plaintiff's favor. It is not like a trifling action of slander arising out of some casual altercation; but the matter complained of and justified on the record was deliberately published, and goes to impeach the plaintiff's character in relation, not merely to his professional skill and capacity, but as to his honesty and integrity in the discharge of his professional duties. It is to him a subject of vital importance, and I cannot say I think the charges sustained by satisfactory proof, &c. It is not like granting a new trial where a defendant has been acquitted of an alleged libellous publication, in which the jury may be of opinion it was not published, or was not libellous; but it is a case in which the plaintiff has been convicted of fraud and dishonesty not adequately supported in evidence. It seems to me a case in which we ought to grant a new trial if in our power, although applications of this kind, in actions of this nature, are not to be favored.

MCLAN, J., and RICHARDS, J., concurred.

Rule absolute, on payment of costs.

GOODERHAM ET AL. V. HUTCHISON.

Promissory note—Consideration of.

J. H. & Sons, a firm in Toronto, had been in the habit of drawing on their correspondent in England, and at first of covering such bills by shipments of flour—latterly, by money remittances. In the fall of 1854 they had largely overdrawn their account, and their correspondent in England had been repeatedly requesting them to desist from drawing. In December 1854, they drew several bills, which they sold or exchanged for promissory notes, and amongst others, they obtained the note sued upon. This note they gave, with several others, in payment of their account to G. H. & Co., and a few days after failed. The bill for which the note was given was returned dishonoured for non-acceptance. T. H., the maker of the note, resisted payment of the note, on the ground that it was procured from him by fraud, and without consideration, and taken by G. H. & Co. with notice of the fraud, and without consideration.

Held, first, that there was evidence to go to the jury that the note had been procured by fraud; that if J. H. & Sons drew the bill for which the note was given, having no expectation or right to expect that it would be honoured, they practised fraud in procuring the note which they took in exchange for the bill. *Held*, second, that a pre-existing debt is a good consideration in whole or in part for a promissory note or a bill of exchange.

Writ issued 6th of March, 1855. Declaration, 15th of March 1855.

The declaration states that defendant, on the 21st of November 1854, made his promissory note, and promised to pay to Joseph Helliwell & Sons, or order, at the Branch City Bank of Montreal in Toronto, £610 3s. 5d. three months after date, and that the said Helliwell & Sons then endorsed the said note to the plaintiffs, &c.

Pleas—20th of April, 1855:

First—That the making of the said note by defendant to Helliwell & Sons, and the delivery thereof to them, was obtained from the defendant by the said Helliwell & Sons, and others in collusion with them, by fraud and covin, practised upon defendant by the said Helliwell & Sons &c.; and that the plaintiffs before and when the said note was first endorsed to them, and when they first received the same, had full notice of the premises in this plea mentioned: verification, &c.

Second—That defendant was induced to make and deliver the said note to the said Helliwell & Sons by fraud and covin, &c.; and that there never was any value or consideration for the said endorsement of the said note by the said Helliwell & Sons to the plaintiffs, or for their being the holders thereof: verification.

Third—That the said note was given by the defendant to the said Helliwell & Sons (together with another note made

by defendant) as the price and value of, and in consideration for, a bill of exchange, which they had drawn upon Robert Smith, in Lancashire in England, to their own order, for £1000 sterling, &c., at three months after sight thereof, and which they then, to wit, on the 28th of December 1854, endorsed and delivered to defendant, and then promised him that the said Smith would accept the said bill and pay the same when due in England, where it was made payable; and that defendant, relying thereupon, then, to wit, on the day and year last aforesaid, accepted and received the said bill of exchange of and from the said Helliwell & Sons, and thereupon gave them, as part consideration and value therefor, the said promissory note, and that there was no other value or consideration therefor, &c.

That at the time the said Helliwell & Sons drew the said bill of exchange, and thence until it was presented to said Smith for acceptance, the said Smith had not any effects of said Helliwell & Sons in his hands, nor had he received any value or consideration from them for the acceptance or payment thereof, &c. That the said Helliwell & Sons had not money to pay the said bill, nor had they reason to expect, nor did they expect, that they would be able to provide money to meet the said bill, nor did they ever provide money for that purpose; nor had they any reason to expect, nor did they expect, that the said Smith would accept the said bill, nor had he agreed to do so; and that the plaintiffs, before and at the time when the said Helliwell & Sons first endorsed the said note to them, and when they first received the same, had full notice of all the premises aforesaid, and that the said bill was afterwards, and before the said note became due and payable, to wit, on the 15th of January 1855, presented to the said Smith for acceptance, which was refused, and the said bill protested for non-acceptance, of all which the said Helliwell & Sons, afterwards, to wit, on &c., had notice; and said Smith always hitherto refused acceptance of the said bill, and the said bill was thereupon returned to the defendant, who presented it to the said Helliwell & Sons, and demanded payment thereof; and the said Helliwell & Sons have always refused to pay the same; and so defendant says there never

was any consideration or value for the making of the said note, or for the delivery thereof to the said Helliwell & Sons, and that the said Helliwell & Sons always, until they delivered the same to the plaintiffs, held the said note without value or consideration; and the plaintiffs, before and at the time when they first received the said note, had full notice that the same had been given to the said Helliwell & Sons without any consideration or value having been received by defendant for the same, and without said Helliwell & Sons having given any value or consideration therefor: verification.

Fourth plea same as third to the allegation of want of consideration, and then alleges that the endorsement of the said note by the said Helliwell & Sons to the plaintiffs was obtained and procured from them by the fraud, covin and misrepresentation practised by the plaintiffs, and others in collusion with them, upon the said Helliwell & Sons: verification, &c.

Fifth plea same as third to the allegation of want of consideration, and then alleges that there never was any value or consideration for the said endorsement of the said note by the said Helliwell & Sons to the said plaintiffs, or for their being the holders thereof: verification, &c.

Sixth plea same as third to the allegation of want of consideration and then alleges that the plaintiffs, before and at the time when the said note was first endorsed to them, and when they first received the same, had full notice of the premises in that plea mentioned: verification, &c.

Replications—*De injuria* to each plea; to the country; similiter and issues.

The case was tried before *Macaulay, C. J.*, at the last spring assizes for the counties of York and Peel.

The plaintiffs put in the promissory note, dated Toronto, 21st November 1854, made by defendant to Joseph Helliwell & Sons for £610 3s. 5d., payable three months after date, for value received, and endorsed in blank by Helliwell & Sons; protested for non-payment at plaintiff's instance on the 24th of February 1855. The defendant, in order to establish fraud or imposition in the Helliwells in obtaining the note, and to shew that the plaintiffs were aware thereof, and did not give value for, or obtain the note *bonâ fide*, gave in evidence to the

following effect: In the first place, a short letter from Helliwell & Sons to defendant, dated 22nd December 1854, saying: "We are about to write our letters for the English mail,—will you please, should you want any exchange this mail, call on us as early as possible?"

2nd—A bill of exchange, dated Toronto, 23rd December 1854, drawn by Helliwell & Sons on Robert Smith, of Bacup, Lancashire, for £1000 sterling, payable three months after sight to their own order in London, value received; and to place the same with or without further advice to their account; endorsed, "Pay Thomas Hutchison or order, signed Joseph Helliwell & Sons," protested in London for non-acceptance, on the 15th of January 1855, at the request of Barnett, Hoan & Co., endorsers of defendant. Upon reading a letter, dated Bacup, 13th January 1855, to them, signed Jas. F. Smith, stating that his father was quite disappointed at not receiving funds from Messrs Helliwell & Sons of Toronto by the last mail, in consequence of which he declines accepting this bill; and further the letter states in a postscript, that Robert Smith had sailed that day for Toronto. Notice of dishonour was given to John Helliwell, one of the firm, on the 5th of February 1855, and restoration of defendant's promissory notes demanded.

Third—A paper admitted in evidence at the end of defendant's proofs, as follows:

"Toronto, December 23rd, 1854.

"MR. THOMAS HUTCHISON,

"TO JOSEPH HELLIWELL & SONS, DR.

December 23—To 1 bill of exchange on Robert

Smith, of Bacup, at three months sight,

10 per cent. premium£1222 4 5

Cr.

By 1 note at three months, November 21..... 610 3 5

By 1 note at three months, November 24..... 612 1 0

1222 4 5

"The above notes we agree to retire when due, and take notes for like amounts, at the same time adding interest.

(Signed,)

"J. HELLIWELL & SONS."

Clarkson, a witness, called for the defendant, stated that on the 25th of December 1854—perhaps a few days before he knew that exchange of the Helliwells had been protested in England—that he did not know whether their paper would or would not be accepted, but he would not have bought a bill of exchange from them. That he believed that the plaintiffs had much dealing with them chiefly in making advances on produce, discounting notes of theirs, and occasionally buying flour of and selling wheat to them. That the Helliwells operated very largely here, and had drawn largely on England, nearly to the amount of £50,000, and that their remittances fell short £7,000. That their way of doing business here was to give bills and take notes, and so it was not extraordinary that they should be large holders of promissory notes.

Another witness (Mr. Roaf) said, the plaintiff Howland had been examined in the Court of Chancery and at the assizes, relative to a note believed to be the one in suit, and had said that notes of Brett, Taylor and Stephenson, and of defendants, were transferred to the plaintiff's firm, including Wilmot, who was a partner of the same firm, residing in New York. That the transaction commenced on the 28th, and was concluded on the 30th of December last. That Goodenough, as broker of Helliwell & Sons, had offered to discount promissory notes, or had applied to the plaintiffs to do so, and that seven promissory notes were discounted, and the proceeds applied to satisfy a debt due to the plaintiffs by Helliwell & Sons and £250 then advanced. That £500 was advanced on the 21st of December, and that the note now in suit, and one of Brewer & McPhail, were carried out against the £750, and was so entered in the plaintiffs' books. That in the course of his examination, owing to some discrepancy between his depositions and the books, he explained that it formed one transaction on the 30th of December—that is, that the notes were entered separately in the books, but all formed one transaction. That he stated then that Helliwells still owed the plaintiff £400 after crediting all the notes; that he felt the Helliwells were not doing a sound business, and must

ultimately fail, but he denied notice of their insolvency; that he further said there was an account current shewing £1000 in Helliwells' favour at the end of the year, due by the plaintiffs to them, such account including credit for the proceeds of the seven promissory notes, but that 525 barrels of Don Mills' flour were deficient when they heard from Boston, which, together with £187 advanced in January, turned the scale the other way.

Robert Smith, called by the defendant, stated that he had dealings with the Helliwells, commencing about two years back, to the extent of £50,000 or £60,000, principally in flour and wheat, and a few bills of exchange; that he had considerable dealings with them in flour in 1854, in the summer months, and a few bills of exchange at the latter part of 1854, not before; that formerly they drew against flour, but that latterly there were no funds to meet their bills, and that in December he had no funds of theirs or of his own. That he had remonstrated with them, and had written to say that if they were not more punctual in remitting to him he would not feel justified in accepting any more drafts, as he was already in advance, and out of pocket some thousands of pounds, but that he did not intimate to them the state of his own solvency; he however said he would draw no more money out of his (Smith's) partnership concern. That the Helliwells' account improved, but was not cleared, and had got worse since, and that he, Smith, was no longer a partner in the firm in England. That they had ruined him by his paying their bills out of his own funds, and that he left England on the 12th or 13th of January last, and came to this country to see after the Helliwells' affairs. That on the 24th of December last he had no funds of theirs to meet the bill of exchange in evidence; that he left England about the time it reached there; that he had accepted all their bills that were presented to him while in England; that they did not remit, but he went on accepting, and could not say they might not have supposed that he would accept a bill drawn on the 23rd of December; that he had himself accepted until some time in December, and before leaving

had appointed his brother-in-law his attorney, with full powers to act for him, including the acceptance of bills; without directions to accept, but with instructions that from Helliwells' letters there was every reason to expect remittances, and that if they came and bills were drawn, to accept; that if bills came without remittances, he, Smith, did not think he should accept, but for his agent to do as he liked; that the Helliwells had promised remittances, but that he did not find that any had been made.

Mason, a witness for defendant, said, that being interested in the Helliwells' estate, he went to the plaintiff Worts in the expectation that he would be an assignee; it was before the assignment, about the 15th of January; and that he Worts spoke very freely of the Helliwells' affairs, and the way they had been going on, and had been gambling in flour, referring to a conversation he had had with one of the Helliwells; that he also said, merchants must be great fools to buy such exchange as that.

Stephenson, a witness for the defendant, said he had a conversation with the plaintiff Worts respecting Helliwells' affairs about the 16th or 17th of January. Speaking of this exchange, and being a sufferer, he wanted to be privileged for the same; that Worts said he was astonished that merchants would have anything to do with such exchange, as everybody knew it was worth nothing; that they were talking of Helliwells' exchange on Smith generally.

Hagarty, Q. C., for plaintiffs, objected:

1st—That there was no proof of what the consideration received by the defendant for the note was.

2nd—That there was no proof that it was obtained fraudulently.

3rd—Nor any proof that the plaintiffs knew or had notice of the consideration.

Macaulay, C. J., said, that as to the first and second objections, he would leave them to the jury, but that he was not prepared to say that there was legal evidence of the scienter in the plaintiffs.

Eccles, for defendant, contended that there was proof of

fraud; and if fraud was shewn, the plaintiffs should prove value, and that a then subsisting debt was not proof of valuable consideration under the pleadings.

Macaulay, C. J., said, that the case might go to the jury; that the transaction was not in regular course; that a bill of exchange was bought for a promissory note, renewable, and the consequence was, that the defendant sent his negotiable note, and the Helliwells sent their bill of exchange, into the market; that before the bill of exchange was returned the plaintiffs became the holders of the note, if so, whether for value, of which he thought there was evidence, he would tell the jury he could not point out evidence that proved the plaintiffs knew the Helliwells were insolvent when they gave the bill, or whether the plaintiffs bought the note of them, or that they knew the note had been fraudulently obtained, for there was no proof that they had any reason to suppose the bill, if they knew of it, would not be honoured, or that it was the consideration for the note which bore date the 21st of November, a month before the date of the bill.

Williamson, the plaintiff's book-keeper, was then called on their behalf; he said he knew how the plaintiffs got the note in suit, he looked at a book and said the note came into his hands on the 28th of December; that the plaintiffs gave the Helliwells £500 on one occasion and £250 on another, against which two notes were put; that there were five other notes received of the Helliwells on the 30th, and carried to their credit in the plaintiffs' books; that the Helliwells were at the time of the trial indebted to the plaintiffs in the sum of £400, on transactions before this action; he turned to Helliwells' account as entered in another book of the plaintiffs, and also in their ledger—*i. e.*, plaintiffs' account with the Helliwells; he said that he rendered an account to the Helliwells to the end of the year 1854, in which the notes were credited to them, shewing a balance in their favour of £1004 4s. 8d., they, the Helliwells, being credited with seven notes, amounting in all to £3,800, but that the true balance was against the Helliwells, the plaintiffs having paid them for 1000 barrels of flour not delivered; that the

plaintiff Worts headed the account in his presence, and said there was an undelivered quantity of Don Mills' flour to be charged against it, 503 barrels not delivered; that the plaintiffs advanced them on the 8th of January £187 10s. which, together, turned the balance £400; that the plaintiffs were entitled to charge the deficient flour at Boston prices, and were waiting for advices, and that no doubt the Helliwells were indebted to the plaintiffs.

On cross-examination, the defendant's counsel referred to the plaintiffs' account with the Helliwells, contained in the ledger, and also in the other book, and asked the witness why the entries on one page of the latter were different on a succeeding page, which he explained to have been done to correspond with the real transaction, and because the first entry was inadvertently otherwise.

Macaulay, C. J., left the case to the jury, as already mentioned, except that the defendant's counsel pressed upon the jury that if the notes were received only on account of, or to secure pre-existing debts, as the original entry imported, it would not constitute value within the exigency of the rule, when the defendant shewed a good defence on the ground of fraud and want of consideration as against the payees, from whom the plaintiffs received the note. The charge was objected to, and the jury found for the defendant on the part of the plaintiff.

During the following term, *M. C. Cameron* obtained a rule *Nisi* to set aside the verdict as being contrary to law and evidence, and for misdirection, and for the reception of improper evidence.

Eccles and *McMichael* shewed cause, and *Eccles* contended: 1st—That the facts shewed the note to have been obtained by the Helliwells by fraud, and that such proof put upon the plaintiffs, the onus of proving that they gave value for it—*Bailey v. Bidwell*, 13 M. & W. 73; *Harvey v. Towers*, 6 Ex. R. 656; *Berry v. Alderman*, 24 Eng. R. 818.

2nd—And that no sufficient value was proved; that it was incumbent upon the plaintiffs to prove a present original or new consideration as discounting the note, or making advances

upon its security; and that merely taking it on account of, or in security for, a pre-existing debt or demand, was insufficient—*De La Chaumette v. The Bank of England*, 9 B. & C. 208. He also submitted that the note being payable at a future day, and not on demand, made no difference on this head—*Vallance v. Siddell*, 6 A. & E. 932; S. C. 2 N. & P. 78.

Byles on Bills, 28, 29, 95, 4—Though a sufficient consideration in other respects, and irrespective of the instance in which a good defence exists as between the defendants and the party from whom the plaintiff received it. That *Bailey v. Bidwell* distinguishes between a mere want or failure of consideration and fraud in obtaining the note.

3rd—That there was sufficient evidence to go to the jury of notice or knowledge of the fraud or imposition practised upon the defendant, referring especially to the plaintiff's account book, in which the two sums of £500 and £250 were originally charged in the general account on the 21st and 28th of December respectively, and the promissory notes also credited, but afterwards separated, and the £750 deducted from the notes, and the balance only carried to the general account; also referring to the extensive transactions with the Helliwells, shewn by the plaintiffs' books, including many items of bills or notes of theirs, retired by the plaintiffs, shewing their frequent defaults.

McMichael, on the same side, submitted that the defendant might retain his verdict if any one of the three points left to the jury was sustained in evidence; that the plaintiff's accounts did not shew any consideration for the note being overbalanced with £1000 to the credit of the Helliwells; so not even a part consideration was shewn, and that a part consideration was no consideration without something additional or new, as forbearance, as if the defendant had himself given the note to the plaintiffs to secure the debt of the Helliwells in consideration of the plaintiffs giving time—*Crofts v. Beale*, 11 C. B. 172; *McGillivray v. Keefer*, 2 U. C. Q. B. R: also that the plaintiffs must have known the state of the Helliwells' affairs, from the extensive transactions they had with them, and that obtaining the seven notes on the brink of their failure showed an undue prefer-

ence given to the plaintiffs, while others, who trusted them, relying upon their solvency, were duped and deceived. That the only apparent object in the plaintiffs acquiring the notes was to secure themselves, not against even pre-existing debts, but future contingencies, should the Helliwells become indebted to them, without any new advance made or promised.

Hagarty, Q. C., in reply, contended: 1st—That there was not sufficient evidence of fraud; that Smith's evidence shewed that there was a reasonable ground for the expectation that the bills would be accepted; that there was no fraud or imposition meditated, although the consideration did eventually fail—2 Kent Com. 514; that fraud in fact must be established, and was not proved, nor proof of any plan or design to cheat in the Helliwells; and that if they acted in the *bonâ fide* belief that the bills would be honored, with reasonable grounds of expectation, it repelled the imputation of fraud.

2nd—That there was no evidence to go to the jury to establish the plaintiffs' knowledge of what the consideration for the note was, or that it was upon a bill transaction.

That want of caution was insufficient, and defendant must shew bad faith—*Gill v. Cubitt*, 3 B. & C. 466—overruled by *Goodman v. Harvey*, 4 A. & E. 870; S. C., 6 N. & M. 372, and *May v. Chapman*, 16 M. & W. 355. That wilful blindness, if sufficient, was not shewn; that nothing short of *crassa negligentia* would do—*Berry v. Alderman* Com. L. R. 466; S. C., 22 Eng. Rep. 484; *Smith v. Browne*, 16 Q. B. 244; *Fairclough v. Pavia*, 9 Ex. 690; *Story on Bills*, secs. 191, 192, 194.

3rd—as to value.—That an existing debt is a good and valuable consideration—*Story on Bills* 192, and note; *Smith v. Dewitts*, 6 D. & R. 120; *Holford v. Worthington*, 22 L. T. 183. That there being seven notes, the defendant cannot single out his, and dispute the transfer, leaving the others unaffected. That there was a balance in fact due by the Helliwells to the plaintiffs, although £1000 appeared to their credit as the account rendered stood—*Baker v. Walker*, 14 M. & W. 465. That there was sufficient consideration or value shewn—*Hopkins v. Logan* 5 M. & W. 241. That if sued

by the plaintiffs on the original demand before the defendant's note became due, the Helliwells might have pleaded this negotiable note as a temporary bar. That it was misdirection to leave the question of fraud or scienter to the jury.

M. C. Cameron, on the same side, contended, that the written memorandum was not admissible in evidence against the plaintiffs, being a transaction of which the plaintiffs had no knowledge; and if admissible, it imports the notes given in November, drawn in favour of or bought by the Helliwells with bills of exchange not drawn for a month afterwards, wherefore the bills could not have been the original consideration, and it might have been that the notes were for accommodation in the outset and the bills afterward given.—*Parsons v. Wilson*, 3 M. & G. 446; *Palmer v. Richards*, 15 Ju. 41; S. C. 6 Ex. R. 335; *Marston v. Allen*, 8 M. & W. 494; *Pontifex v. Bignold*, 3 M. & G. 63; *Taylor v. Ashton*, 11 M. & W. 401; *Byles on Bills*, 90-91, as to value.

MACAULAY, C. J., delivered the judgment of the court.

The first consideration is, whether the promissory note for which this action was brought was obtained by the Helliwells from the defendant by fraud. *Foster v. Charles* (6 Bing. 403; S. C. 7 Bing. 107), *Polhill v. Walter* (3 B. & Ad. 114), *Taylor v. Ashton* (11 M. & W. 401), *Shewsbury v. Blount* (2 M. & G. 475), *Thomas v. Bigland* (8 Ex. 729), *Byles on Bills*, 95, *Rex v. Jackson* (3 Camp. 370), *Noble v. Adams* (7 Taunt 59; S. C. 2 Mar. 366), *Irving v. Motly* (7 Bing. 552), *Gladstone v. Hadwen* (1 M. & S. 525), *Earl of Bristol v. Wilsmore* (1 B. & C. 514), *Kilby v. Wilson* (R. & M. N. P. C. 178), *Read v. Hutchinson* (3 Camp. 352), *Vertue v. Jewell* (4 Camp. 31), *Byles on Bills* 291, *Ferguson v. Carrington* (9 B. & C. 59), *Load v. Green* (15 M. & W. 216), *White v. Garden* (10 C. B. 919), *Stephenson v. Hart* (4 Bing. 476). Referring to the cases above cited, I am not satisfied that to constitute fraud, in a case like the present, the evidence must necessarily go so far as to prove a deliberate preconceived plan to cheat and to impose a bad bill upon the defendant for a good promissory note, knowing that it would not be paid, and without any

intention or expectation of ever taking it up themselves. It nevertheless strikes me that the circumstances should be such as would support an action on the case for deceit.

The cases seem, I think, to warrant the inference, that if the drawer had no reasonable ground to expect that his bill would be accepted and paid, or that if returned he could retire it, owing to insolvency in himself and want of any authority to draw, or of solvency in his drawee, it would be evidence of fraud for the jury; but that, if he only meant to give his bill, and himself by the bill, more credit than they deserved, but intending to carry on his business, and hoping the bill would be honored; or if not, intending to try and take it up whenever he could, in short, did it, really hoping to get on and not then meditating an early failure; or if he really had reasonable grounds to expect that the bill would be accepted, and if accepted would be paid, I apprehend that, however reprehensible as an act of indiscreet overtrading or the like, it would not exhibit that *mala fides*, which would constitute it a fraud. Upon consideration, I still think it a question properly for the jury, and that the contrasted points of view in which it ought to be left to them are, on the one hand, whether the Helliwells drew the bill in good faith, with reasonable grounds to expect that it would be accepted by Smith, and if so that it would be paid by him; thus over-drawing with the *bona fide* intention of supporting their credit and continuing their business, aided by the funds or means of procuring credit or funds thus acquired; or, on the other hand, whether they had a sinister object, and drew the bill knowing that they were on the eve of failing, and in order to procure the means of unfairly possessing themselves of funds or securities, or of preferring favoured creditors at the defendant's expense, and without any well grounded or real hope or expectation of being able to reimburse him or to retire the bill; knowing also that having already largely overdrawn upon Smith, and that previous bills on him had been protested for non-payment, whether it was reasonable for them to expect he would accept any more; in short, knowing all the circumstances, and knowing the defendant was ignorant of them, whether they drew the bill in bad faith,

knowing they were imposing upon the defendant without any prospect or expectation of being able to indemnify him in the premises. In the one event the transaction would be divested of fraud, in the other, it would be tainted with it. If it was only the vain, but *bond fide* effort of a failing firm to sustain themselves, it would be free from the imputation of fraud; but if there was *mala fides*—that is, a design to sell worthless exchange and to get good promissory notes, not with the honest intention of supporting their credit and business, but for the dishonest purpose of getting possession of other peoples' property, on the eve of their own failure, and to enable them to protect and favour old creditors at the expense of new ones—it would be equivalent, I think, to a pre-conceived intention to defraud the defendant of the notes, and would support an action for deceit, although it fell short of obtaining the note by false pretences: the light in which their conduct should be viewed is for the jury. If no fraud, there was not the want of original consideration for the note, although such consideration failed afterwards when the bill was dishonored and the Helliwells became bankrupt.

Two questions then arise: 1st, Whether the plaintiffs had given value; and if so, 2nd, whether they became endorsees of the Helliwells *bond fide*, before the note was due.—14 M. & W., 737. That they became endorsees before it became due is not denied.

1st. It was objected that the case was left to the jury incorrectly, as depending not upon the mere fact whether the Helliwells were indebted to the plaintiffs upon past transactions or for present advances, or partly both, and the note endorsed on account thereof, but whether the consideration between the plaintiffs and the Helliwells was present or new advances as distinguished from past dealings and pre-existing debts or liabilities; and a new trial is moved on this ground of misdirection, inasmuch as the jury may have found against the plaintiffs, not because the Helliwells were not in fact indebted to the plaintiffs, or because they did not become endorsees of the note *bond fide*, but because it was received on account or in payment of previous demands, and not in respect of present or new advances. When this view was

presented to my mind at the trial, I was under a strong impression that such was the rule, when the object of proving an endorsement for value and *bonâ fide* was to displace a good subsisting defence as between the defendant, the party whose endorsees the plaintiffs were; and under certain circumstances such has been laid down as the rule, whether such rule applies to the circumstances of this case is the question. *Smith v. DeWitts* (6 D. & R., 120.—This was an action by the endorsee against the acceptor of a bill of exchange; it appeared the defendant had given the bill to one Crozan to get discounted, and to deliver the money to defendant, instead of which he absconded for debt, after becoming bankrupt, and took the bill with him, and being followed by the plaintiff, to whom he was indebted for goods sold, was overtaken in Paris, where he obtained the bill in question, with other securities, in satisfaction of the previous debt, the plaintiff being at the time ignorant of the fact of his having committed an act of bankruptcy. At the trial, Abbot, C. J., said that if the plaintiff had sold C. the goods upon the credit of the bill it would have made a difference, and would have entitled him to recover, but inasmuch as the goods had been originally furnished to C. upon his own personal credit, the action must fail, it appearing in evidence that the bill had been given to the latter not for his own benefit, but for the benefit of the defendant, from whom he received it. And afterwards in *banc.* upon application to set aside the nonsuit, the rule was refused, on the ground that C. could not transfer to the plaintiff a better title than he had himself, and that holding it as he did without consideration, he could not confer a better title than he could had he given full value for it. Abbott, C. J., said if the bill was accepted for value, the plaintiff could never have recovered on it; because Crozan being at that time (*i. e.* of the delivery to the plaintiff) a bankrupt it would have passed to his assignees, adding, that obtained and held as it was by C., it would be contrary to the first principles of natural justice to say that the plaintiff was a *bonâ fide* holder for value. Holroyd, J. said, that if the bill had been delivered to a *bona fide* holder for valuable consideration, ignorant of the circumstances

under which it had been obtained by C., he might sue the acceptor, notwithstanding the want of consideration given by him, but that the argument went a great deal further and assumed that C. was not a bankrupt when the plaintiff received the bill, and that the property of Crozan, if any, vested in the assignees, &c. In the above case stress is laid upon the rights of the bankrupt's assignees, interposing and shewing that C. retained nothing in the bill that could transfer a right of action thereon against defendant in preference to the assignees, who, it was admitted, could not have enforced payment against the defendant.

I find no report of this case in the contemporaneous reports (B. & C.); see also *De La Chaumette v. The Bank of England* (9 B. & C., 208; S. C. 2 B. & Ad., 385), *Baker v. Walker* (14 M. & W. 465), *Arbouin v. Anderson* (1 Q. B., 498), *Crofts v. Beale* (11 C. B., 172), *Pillans v. Mierop* (8 Bur. 1664), *Story on Promissory Notes*, sec. 195; *Bosanquet v. Dudman* (1 Star. 1), *exparte Bloxam* (8 Vez. 531), *Haille v. Smith* (1 B. & P. 563), *Heywood v. Watson* (4 Bing. 436), *Percival v. Frampton* (2 C. M. & R., 180). The decisions appear to have been fluctuating in the United States Courts—See *Story on Promissory Notes*, sec. 195, note 11. The leading authorities were cited and commented on in *Swift v. Tyron*, and the doctrine of *Story* sec. 195, strongly upheld by the judges of the court; that case being one of a pre-existing debt, and the decision being that of the Supreme Court of the United States. It was afterwards controverted by *Walworth, Ch.*, in *Slatkin v. McDonald* (6 Hill 93), but approved of by *Chancellor Kent* in the note to the 6th edition of his *Commentaries*, page 81, vol. 3.

Questions of value may arise in several distinct points of view :

1st.—When a promissory note, for example, is discounted with cash, or endorsed in consideration of new advances, or taken to secure advances promised to be made.

2nd.—Or, when endorsed by a debtor to his creditor on account or in payment of pre-existing debts, due and payable presently or at a future day.

3rd.—Or as collateral security for pre-existing debts, due and payable presently or at a future day.

4th.—Or merely to cover contingent unascertained damages incurred, or likely to arise out of past transactions.

5th.—Or whether the consideration is a combination of two or more of the above subjects.

The sufficiency of the consideration as between the maker and endorsee, although good as between the payee and his endorsee, does not seem to be distinctly settled in England, and in some of the principal courts in the United States there has been much diversity and fluctuation of opinion: it is not surprising, therefore, that I find it a difficult and perplexing question to dispose of. In the present case I do not think it necessary to notice the third contingency, because it is not pretended, nor does the evidence go to show that the note was transferred merely as collateral security, otherwise than as endorsed by the Helliwells for and on account of their debt to the plaintiffs, which makes it range under the second head. According to much of the evidence, it was alleged that the consideration consisted partly of pre-existing debts and partly of new advances, on account of which this note was taken and credited at par. How far both or either of these considerations existed, was a fact for the jury. If it depended on the fourth point, I am not prepared to say any such contingent claim or demand could form a sufficient consideration consistently with the weight of the authorities, unless the contingency had happened and the actual amount of damages had been liquidated, or been capable of distinct proof before the action was brought. This head is material in the present case; for, according to the state of the account rendered by the plaintiffs to the Helliwells to the 31st of December, 1854, the balance was against the plaintiffs for upwards of £1000, after crediting the Helliwells with the seven promissory notes mentioned by some of the witnesses, including the one in suit, showing *prima facie* that as to £1000 the plaintiffs apparently held those notes without value although it would not appear that the note forming the subject of this suit was so held as composing part of such £1000, because it is credited in the account before the others; and if the account was balanced at that stage without any further additions of debit, or credit, the balance would still

be in the plaintiffs' favour, and the plaintiffs claim the right to apply the notes to the Helliwells' credit in the order they please, which is the general rule. However that may be, whether the whole of a number of promissory notes are received as constituting one transaction in point of funds or the transfer of negotiable securities, the balance of £1000 in the Helliwells' favor was only turned against them by the plaintiffs subsequently, in the month of January following (whether before or after they had notice of the Helliwells' failure, not clearly appearing), charging them a large sum for damages upon an alleged previous flour transaction; and if the note was endorsed with a view to a demand of that kind, existing only in contingency, I am not prepared to say it constituted a valuable consideration at the time. At the trial, however, it was not contended such was the consideration, but that it really consisted of £500 previously advanced and £250 advanced at the time. The claim mentioned was however set up as explaining why and upon what consideration the plaintiffs at such a crisis in the Helliwells' affairs became their endorsers of all the seven promissory notes, which had been previously placed by the Helliwells in Goodenough's hands to raise money or credit upon. How far such explanations are satisfactory or material to the decision of the question of *bonâ fides* in relation to the note in suit was, and upon another trial will be, considerations for the jury.

That there was good consideration, as between the plaintiffs and the Helliwells, if they were indebted to the plaintiffs, is beyond doubt. Then the cases of voluntary preference as distinguished from a preference induced by pressure of the creditor &c. in cases of bankruptcy, may afford illustrations of a rule by which such cases as *Smith v. DeWitt* and *De La Chaumette v. The Bank of England*, may be reconciled with others of a contrary tendency, on the ground that in the one case the transfer is spontaneous on the part of the debtor, evincing a desire to part with the security, and on the other, invited or pressed for by the creditor. In the one case transmitted, unsolicited, with whatever view; in the other transferred, and received upon request on account in satisfaction of the pre-existing debt—see *Kerr v. Coleman* (6 U. C. Q. B. R., 218,

228), for the cases; also Poland v. Glynn et al. (2 D. & R. 310).

Having considered the cases bearing upon the subject, I think the weight of argument is in favor of a pre-existing debt being a sufficient consideration for value; when the endorsement and delivery are in the ordinary course of business between the parties, and made either upon a previous understanding by which the debtors were to give security, or upon the request and desire of the creditor to be secured, it appears to me the laws of commerce operate in favor of the creditors' right when fairly acquired, under such circumstances, when it is a spontaneous act of preference assented to in good faith by the creditor. I am disposed to think the same rule should prevail when suspicious circumstances accompany or surround the transaction; its *bona fides* come before a jury as a matter of fact. To apply the foregoing observations to the present case, it is to be remembered that the note was payable at a future day. The evidence represents that the plaintiffs were applied to by the Helliwells, or by Goodenough on their behalf, to discount or make advances on this and other notes held by them, and that such notes were received by the plaintiffs partly on account of previous advances or pre-existing debts and partly in consideration of a further or concurrent advance of money; consequently it did not appear that the Helliwells had spontaneously transmitted the notes to the plaintiffs in order to collect or to secure their value to the Helliwells without being asked to do so, but that, having placed them in Goodenough's hands to procure their discount, the plaintiffs negotiated their purchase or transfer with him, partly in consideration of or in security for previous money demands of plaintiffs against the Helliwells, and partly of additional advances (although to a much less amount) then made by the plaintiffs to the Helliwells.

Under the evidence, I do not feel warranted in holding that the plaintiffs did not give value for the note in question, if obtained *bona fide*, even although exclusively on account of pre-existing debts.

Whether the Helliwells were in fact indebted to the plain-

tiffs at all when the note was endorsed over to them, or whether the consideration was exclusively pre-existing debts, or partly such debts with new advances, are matters of fact, as left by me, to the jury. I think it must be taken that the jury were of opinion the consideration for the transfer was on general account to secure previous advances, and not upon the new consideration of present or subsequent advances. Assuming, therefore, that in the opinion of the jury the note was assigned by the Helliwells to the plaintiffs on account of previous advances, and to sustain their credit with them, or to secure them, or to give them a preference over other creditors, and that the transfer was made, not as a purely voluntary act on the part of the Helliwells, but that it was owing to the plaintiffs' urgency to be secured, and with a view to sustain their credit with them, I am disposed to think that the plaintiffs would hold for value, if they received the note *bond fide*. As relates to pre-existing debts, no doubt they would constitute ample consideration to support an action upon a promissory note made by the debtor to secure the creditor; and when, as in this case, a note payable at a future day is made, or which is the same in effect, endorsed by the debtor to, and accepted by the creditor on account of such debt; and *a fortiori* if accepted in payment or satisfaction thereof, the condition of the parties is altered, the time for the payment of the debt is postponed, time is given to the debtor, and if that be done in good faith, there would be a new and good consideration in the nature of the transaction; and the note in this case being payable at a future day, is one material ingredient, that distinguishes it from the cases relied upon by the defendant's counsel.—*Belshaw v. Bush* (17 Ju. 67, S. C. 11 C. B. 191), *Griffiths v. Owen* (13 M. & W. 58), *Jones v. Williams* (13 M. & W. 828.)

It follows, that I now think it was on this point left to the jury on too narrow a ground, and that there should be a new trial without costs.

Then, as to the *bond fides*, with reference to the last plea, it involves the question of scienter to a certain extent. The evidence shows that it was a *bond fide* endorsement of the note so as to transfer all the rights the Helliwells could

transfer to the plaintiffs as endorsees absolutely, as distinguished from a mere colourable transfer or secret trust, according to the construction placed upon the term "*bond fide*" in the stat. 13 El. ch. 5, in the case *Wood v. Dixie* (7 Q. B. 892.) The present question is not, however, identical; and here the enquiry seems to be, whether it was *bond fide*, in a more enlarged sense, as in ignorance of the infirmities invalidating the note in the hands of the endorsers, and divested of any collusion in the endorsees to co-operate with the endorsers in accomplishing an unfair advantage against the maker, by rendering him liable to pay to the endorsees what they knew the endorsers could not themselves have compelled him to pay.

The case of *Cumming v. Brown* (9 East. 506), already mentioned, bears upon this point. It was not the case of a bill or promissory note, but of a bill of lading transferred by endorsement, which, according to the law merchant, passed the property, and which is analogous to the transfer of bills and notes, although not in all respects considered as subject to the same rules.—*Solomans v. Nissen* (2 T. R. 681), *Solomans v. The Bank of England* (13 East. 135), *Lounds v. Anderson* (13 East. 131), *Gill v. Cubitt* (3 B. & C. 466), *Dowes v. Halling* (4 B. & C. 330), *Crook v. Jadis* (5 B. & Ad. 909), *Backhouse v. Harrison* (5 B. & Ad. 1098), *Easley v. Crockford* (10 Bing. 243), *Goodman v. Harvey* (4 A. & E. 870). Lord Denman, in making absolute a rule to set aside a nonsuit, said, "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer when the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."—*Bartrum v. Caddy* (9 A. & E. 275), *May v. Chapman*, (16 M. & W. 355).

In the case in the Monthly Law Reports, 1854-5, 641, already mentioned, it is said that if the debtor is notoriously

insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of the debtor, of which proposition the court said it was probably based upon good sense, and may be found sustained by authority.

It is evident that fraud in the Helliwells obtaining the note, and knowledge of the circumstances calculated to impeach their title, existing at the time of plaintiffs becoming the holders by endorsement, became material in the consideration of this point.

We do not know that in finding for the defendant the jury were of opinion against the plaintiffs on this head, as their verdict might have been rested upon the want of a valuable consideration in the view submitted to them by the court at *Nisi Prius*. It is important, however, with a view to another trial, should the jury be of opinion that there was a valuable consideration :

1st.—As to the plaintiffs' knowledge of fraud in obtaining the note; I have already expressed my impression, that, supposing they were aware of nothing more than the date of the note imports as to the time of the transaction between the defendant and the Helliwells, although they did know or believe what the consideration really was in fact, but ignorant of the time being later than the 21st of November; and I have expressed my opinion that the memorandum dated the 23rd of December was not evidence against them on this point. Still there does not seem sufficient to warrant the inference that the plaintiffs were aware that at the time when the bill was drawn—as they may have supposed—it was fraudulent, as being drawn by insolvent drawers upon an insolvent drawee, or by such drawers upon a foreign drawee without authority or funds to meet it, or any reasonable ground to expect that the bill would be accepted and paid, and with a knowledge by the drawers of their own inability to take it up when returned dishonoured.

2nd.—Then there was evidence, although not direct evidence, from which it might be inferred that on the 28th and 30th of December, 1864, the plaintiffs; although ignorant whether any bill that might have been given for the note

in question had been accepted or not, were aware that bills drawn by the Helliwells had been protested in England; but, assuming that if so it was sufficient to put them upon enquiry, it does not appear that upon reference to the defendant they would have learnt more than *the time* when the bill was drawn and the note given to the Helliwells, for at that period it could not have been known whether the bill would be accepted or not, and the Helliwells were in a failing condition, and that any current exchange of theirs drawn upon Smith not yet presented for acceptance, or not yet payable if accepted, in all probability would come back dishonored.

4th. The true state of the account between the plaintiffs and the Helliwells at that time is likewise material. If the Helliwells were not then indebted to the plaintiffs, and no new advances were made on the faith of the notes, there would be no value therefor arising out of past or present transactions.

Such questions as the following are for the consideration of the jury :

1st.—Were the Helliwells indebted to the plaintiffs at that time—that is, when the note was endorsed to them.

2nd.—Were they so indebted upon liquidated demands as distinguished from contingent liabilities for unascertained damages arising out of unclosed transactions.

3rd.—Did the plaintiffs make new advances on the credit of the notes wholly or in part consideration therefor.

4th.—If not, did they take the note in payment of, or on account of, or in collateral security for, pre-existing debts.

5th.—Did they extend the time for payment of existing debts under the circumstances in which the note was received.

Such questions materially affect the question whether the plaintiffs obtained the note fairly and honestly, with a single eye to their own protection, in relation to subsisting money demands against the Helliwells—that is, *bond fide*; or whether they were at the time aware of facts and circumstances from which they must have known that as between the Helliwells and defendant a good defence existed or would arise before the note became due, so that the Helliwells would not be able to enforce payment of it against the defendant, either upon the ground of fraud or failure of consideration, and yet, know-

ing the infirmities surrounding the Helliwells' title, became their endorsees.

The bill of exchange was the consideration for the promissory note; and it could not be said at the time the plaintiffs became the endorsees of the latter that the consideration therefor had failed, although it might be said the plaintiffs were cognizant of facts from which its failure might well be apprehended; for all that was then known, Smith might accept and pay, although very improbable. Reduced then to the consideration, whether it is sufficient to invalidate a promissory note in the hands of an endorsee for value, that he knew the consideration, which was a bill of exchange, payable at a later day, might or might not be paid; and probably not; I am disposed to think the mere knowledge that the drawers had overdrawn, and that the drawee (of whose insolvency, if insolvent, it does not appear they had any knowledge) would probably refuse to accept the bill, if not accepted already, and that the drawers were so involved that it was not probable that they could redeem it if returned dishonored, is not alone sufficient to prove *mala fides* in transactions with negotiable paper like this. If Smith had accepted, there would have been an end of all question, and the most material point is, how far the plaintiffs were aware, or had good reason to suspect, that this bill had not been and would not be accepted. So long as that fact remained uncertain or unknown, I do not see that a creditor might not take or discount a note given in purchase of such a bill, although the drawers had become unable to retire it if returned. It was not at that time known that any bill of the Helliwells had been refused acceptance; and if accepted, it was not known that Smith had failed or become insolvent, although it was known that for some reason he had not paid the exchange of the Helliwells; whether that fact was then known to the plaintiffs or not, being of course a question for the jury under the circumstances as before them in evidence.

If the plaintiffs, for adequate consideration, as already explained, took the note *bond fide*, they would be entitled to recover; if, on the other hand, judging from the state of their account with the Helliwells, their knowledge of the

state of their affairs, and of their connexion with Smith, and the circumstances under which the present, with several other notes, as one transaction, came into their hands, collusion is inferred, or a contrivance appears, by which it was attempted to render the note available in the plaintiffs' hands, both parties knowing that it would not be so if it remained in the Helliwells'.

I should think it would establish *mala fides*; and that it could then be said of it, that the note was not obtained in the ordinary course of business fairly and *bona fide*, without any sinister object in the acquisition thereof; so that, under the whole evidence, I still think the *bona fides* of the transaction must be for the jury.

Without having the facts and conclusions of fact more distinctly ascertained or admitted, I do not see that the legal rule can be declared thereon, otherwise than hypothetically. Was it a fair honest transaction in the regular course of business, or was it out of the usual course, and with a view not only to secure the plaintiffs, but to favor the Helliwells at the expense of the defendant, and enable them to circumvent him, knowing the infirmity of the Helliwells' title as payees of the note?

The short statement of the transaction dated the 23rd of December 1854, headed, between the defendant and the Helliwells, was objected to at the trial as inadmissible against the plaintiffs, being *res inter alios acta*. I still think it was admissible for the only object with which it was read—namely, to shew the transaction as an act done, and as part of the *res gestæ* between the defendant and the Helliwells with a view to the question of fraud as between them, the immediate parties. It was not received as proof that the plaintiffs knew when the bill was given, or that the notes were received by the Helliwells a month after they bear date; there was no evidence that they were aware of its existence or contents.

Then as to the plaintiffs' knowledge of the fraud; I do not think the evidence proved that they knew the notes were made by the defendant to the Helliwells in payment for a bill of exchange, drawn on the 23rd of December 1854, although I still think enough appeared to render it a question for the

jury, whether they did not know, or did not with good reason believe, that the consideration for the note was a sterling bill on Smith. Their large and varied dealings with the Helliwells, and the nature of their transactions as shewn by their books, Clarkson's and other evidence, tended, I think, to shew this, or to lead to this conclusion, although they might have supposed it was given for flour, or some other equally good consideration. But knowledge that it was given upon a bill transaction would not establish knowledge of fraud in such transaction, and they could not know whether the bill would be accepted or refused at the time they became the holders of the note—*May v. Chapman* (16 M. & W. 358), *Fairclough v. Pavia* (9 Ex. R. 690), *Masters v. Ibbetson* (8 C. B. 100), *Berry v. Alderman* (13 C. B. 674), *Cumming v. Browne* (9 East 506),—although the case of a bill of lading has a material leaning upon the present case.

It was there held that the property of goods passed by endorsement, and the delivery of the bill of lading by the consignee to another, *bond fide* for valuable consideration, and without collusion with the consignor, although the endorsee knew at the time that the consignor had not received money in payment, but had taken the consignee's acceptances payable at a future day not then arrived.

There remains the suggestion whether the defendant has precluded himself from objecting by retaining the bill and returning it, according to the principle of such cases as *Street v. Brown* (1 Taunt. 381), *Lewis v. Cosgrove* (2 Taunt 2), *Deady v. Harrison* (1 Star. 60), *Archer v. Bamford* (3 Star. 175), *Campbell v. Fleming* (1 A. & E. 40), *Howden v. Haigh* (11 A. & E. 1033), *National Exchange Co. v. Drew* (25 L. T. 223).

The third plea alleges that the defendant presented the bill to the Helliwells after its return, dishonored, and demanded payment, which was refused. The evidence was merely that he gave notice of non-acceptance, and demanded restoration of the note. If it had appeared that after being aware of the facts now relied upon as invalidating the note, the defendant had acted upon the bill as a still subsisting negotiable security in his hands, he would have waived such

defence as if he had endorsed it over or dealt with it as a continuing security in his hands; but it does not appear that he did more than give notice to the drawers, and the demand of his own note implied a readiness to deliver up the bill. I do not think he was bound to deliver it back, leaving the promissory note outstanding. He had claims against the Helliwells for damages under our statute, in addition to the amount of the bill; and whether he could consistently put the bill in suit against the drawers, or claim damages under the statute, except under the bill, he might want it as evidence in an action of another form with a view to recovery of such damages, if recoverable otherwise than in an action upon the bill itself, as for deceit &c.

No question has been distinctly raised on this head, and I do not at present think there is much weight in it. The defendant's retention of the bill was dwelt upon as shewing that he still had his remedy upon it against the drawers, on whose credit he took it and made his promissory note in payment, not that such retention waived the fraud on their part, if fraud existed, which was denied.

Referring now to the several issues, it appears to me that, to defeat this action, the defendant must establish,

1st—That the note was fraudulently obtained from him by the Helliwells;

2nd—And that the plaintiffs took it as endorsees, *knowing thereof, or without giving valuable consideration* therefor, or not *bona fide*, but in bad faith.

The first plea alleges fraud, and the plaintiffs' knowledge thereof. The second plea alleges fraud, and that the endorsement to the plaintiff was without value. The third plea states a series of facts which may afford evidence of fraud, but which do not charge fraud in express terms; the plea however alleges want or failure of consideration, and knowledge of facts, which, if established, would prove that the plaintiffs did not become *bona fide* endorsees.

The fourth plea is similar to that of the third, except that it alleges fraud on the plaintiffs' part in obtaining the endorsement of the note from the Helliwells, of which (as between the plaintiffs and Helliwells) there was no proof.

The fifth is like the third, except that it denies any valuable consideration for the endorsement as between the plaintiffs and the Helliwells.

The sixth plea follows the third to the same extent as the fourth and fifth, and then alleges notice to the plaintiffs of the facts so specially stated. All the pleas are traversed and put in issue by the replication of *de injuria*.

The observations already made shew to what extent the evidence supported the facts and imputations contained in these pleas respectively, also wherein it formed matter for the jury to determine upon, and wherein it failed to support the pleas, and they need not be repeated.

It appears to me :

1st.—That there was evidence sufficient to go to the jury to show fraud in the Helliwells in obtaining the note in consideration of a bad or fraudulent bill of exchange.

2nd.—But not that the plaintiffs knew of such fraud when they became holders of the note by endorsement from the Helliwells.

3rd.—That there was sufficient evidence to go to the jury that the plaintiffs had given value for this note by taking it on account of pre-existing debts exclusively, or on account partly of such debts and partly in consideration of new or additional advances.

4th.—That there was evidence for the jury to determine whether the plaintiffs became such endorsees *bona fide* in relation to the defence set up and the facts stated in the third or sixth pleas. This rule is however made absolute on the third head last above mentioned, and the effect of the evidence as to the other points must depend upon the facts as they may hereafter appear at another trial.

MCLEAN, J., and RICHARDS, J., concurred.

Rule absolute.

REID V. THE MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF HAMILTON.

Notice of action—Evidence under general issue.

Case, for wrongfully, negligently and carelessly digging and excavating streets in the City of Hamilton, adjoining plaintiff's close, and thereby injuring said close, &c. Plea, not guilty per statute.

Held, 1st, That a by-law should have been passed by the Corporation to sanction the act complained of (McLean J., dissenting.)

2nd., That when there is no by-law, and when the act complained of is done under the statute 18 & 14 Vic. ch. 15, the defendants are entitled to notice of action, coming as they do fully within the spirit of the protecting statute.

3rd., That if the defendants are liable for the tortious acts in the declaration complained of, they are entitled to give special matter in evidence under the general issue.

Writ issued 11th January, 1854. Declaration, 10th May, 1854.

First count states, that plaintiff before and at &c., was possessed of a close or parcel of land in the City of Hamilton, composed of lots numbers 26, 27, 28, 35, 36, and 37, in the survey of lots made by Peter Hunter Hamilton, bounded on the east by a street or highway called James Street, on the south by a street or highway called Robinson Street, and on the north by a street or highway called Duke Street; yet that defendants, wrongfully intending &c., to wit, on the 1st of August, 1853, *wrongfully, and negligently, and carelessly, &c., dug and excavated the said streets* adjoining said close, and so near the same, and also took and carried away therefrom the earth and soil so dug and excavated, in a negligent and careless and improper manner, and without leaving any sufficient or proper support to prevent the soil and earth of plaintiff's close from falling away from said close into and upon the said streets, or prevent the fences of plaintiff, standing on said close, from falling, and lowered thereby the said streets so much, that by reason thereof a quantity of soil and earth of plaintiffs' said close gave way and fell in and upon the said streets and was washed down and carried away, and whereby also said plaintiff's said fence surrounding said close fell, and plaintiff was thereby greatly incommoded &c., and obliged to build a stone wall to prevent the further falling of the earth &c., of the said close, and the value of said close hath been greatly diminished, &c.

Second count: That before and at &c., plaintiff was possessed of a dwelling house and close in the City of Hamilton, bounded on the east by James Street, on the south by Robinson Street, on the north by Duke Street, and on the west by lands of Robert Roy, which streets before and at &c., were on or about the same level with the said close of plaintiff, whereby the soil and earth of said close was supported and kept from falling, and plaintiff had free access to and from said streets into and from said close at all times, for carts, carriages, horses, and foot passengers, &c.; yet defendants, well knowing, &c., wrongfully, negligently, improperly and injuriously, to wit, on the first of August, 1853, dug and excavated the said streets, and lowered the same below the original level without leaving sufficient support to prevent the earth and soil of plaintiff's close from falling away; by reason whereof a great portion thereof did give way and fall in and upon the said street, and was washed down and carried away, and also thereby the plaintiff's fences around said close gave way and fell down, and plaintiff prevented access in any manner to his said close and house from the said streets until he made a foot way at great expense from Duke street up to said close, and at large expense built a stone wall and stair-case to allow access on foot, and hath been deprived of any access from said streets to said close, for horses, carts, carriages, &c., whereby &c.

Third count: That before and at &c., plaintiff was possessed of a dwelling house and close in the City of Hamilton, bounded as before described; that before and at the time when, &c., the said streets were, and from time immemorial had been, on or about the same level with said close of plaintiff, by means whereof the soil and earth was supported, &c., and plaintiff had free access therefrom into and upon, and to and from said close, at all times, for all horses, carriages, foot passengers, &c.: yet defendants, well knowing &c., to wit, on the first of August, 1853, wrongfully dug and excavated the said streets adjoining said close, and took and carried away the soil and earth thereof, &c., and greatly lowered the same, &c., as in last count,—omitting any charge of negligence.

Plea—Not guilty *by statute*. Defendants referring to 14 & 15 Vic. ch. 54, on being called upon by a judge's summons.

At the trial, before Draper, J., autumn, 1854 :

On plaintiff's part evidence was given—that by the defendants' book of minutes it appeared that on the 24th of August, 1852, the council passed a *resolution* for the preparing plans and specifications for grading and gravelling Upper James street; that tenders be advertised for according to such plan. That on the 1st of September, 1852, the council passed a resolution appointing Carr (or Kerr) to superintend the improvements on John, James and York streets, or any other work let out on contract. That on the 15th September 1852, the council resolved that the tenders for grading and gravelling James street be referred to a committee to accept the most beneficial tender: that on the 20th September 1852, by articles of agreement, executed under hand and seal of Garratt Kenney and Patrick Cain, (but not by defendants) but stated to be entered into by said Kenney and Cain of the first part, and the Mayor, Aldermen and Commonalty of the City of Hamilton, of the second part; the parties of the first part agreed, according to the specification annexed, to grade, drain, macadamize and gravel that part of James street in said specification mentioned and described, &c., on or before the first of December then next, to be paid as the work progressed upon the estimates of (defendants') engineer, and the ultimate balance upon his certificate of satisfaction with the work, &c., with various stringent clauses or checks upon the contractors. It concludes as if the Mayor had, or was to sign and seal it with defendants' seal. The specification stated that the work on upper James street would consist in lowering parts of the hills, filling up hollows, building culverts, and repairing the same; macadamizing, gravelling, forming and regulating the surface throughout to one uniform and regular plan as therein described, and according to grades laid down on the profile plan of said street. It then refers to the plan, shewing the length and levels, &c., as they were, and were to be made; the breadth of the road to be thirty feet inside or between

the water tables or ditches, and the breadth of metalling to be 20 feet. The side-slopes &c., to be one and a half horizontal to one perpendicular &c. The side streets leading to and from it to be graded at the junction to a rise or fall of one in twenty, so as not to have a steeper slope than one in twenty where they join James street, with a variety of detailed particulars; to be observed and approved of by the engineer in charge, in relation to the grading, metalling, &c. That opposite plaintiff's property in Upper James street there is a very steep hill, and also on McNab street, to both of which streets plaintiff's property extended. That there was a sharp turn from James street into Augusta street, so as to render it likely a carriage might over-turn, but at the time of the trial the road was on a moderate scale, as one witness stated. Kear the engineer, being called for plaintiffs, stated, that the work had been done under his superintendence by Kenny and Cain, and it was proved they had received payments on account of their contract. That the intention was to cut the road thirty feet wide and about two feet on each side, but that the contractors did in fact cut nearer than that to plaintiff's land without directions. That Duke street was cut and lowered on the north of plaintiff's land and the soil taken by Kenny from Robinson street, which is south of plaintiff's property, and used upon part of James street: that James street was raised three or four feet higher than Augusta street, but Augusta street was not adjoining plaintiff's close. That at thirty-four feet width for the improved road, there would at the base (or bottom) be sixteen feet left to plaintiff's land, measuring from the centre ($17 \times 16 = 33$, or half a chain). That the defendants' cut at plaintiff's was about six feet, and allowing seven feet to be cut off the sixteen feet at the top, nine feet would remain untouched before reaching the plaintiff's land: that so far as the James' street work was concerned, no part of it was done carelessly or negligently: that the alteration of the street was a great general improvement. Kenny the contractor said, that opposite plaintiff's they cut James street according to the plans and specifications and directions of the engineer, and opposite to the plaintiff's lot cut up to the

lot very nearly, and went the distance they were obliged to go: that the cutting was very hard, and he had to blast the underpart: that they cut on the street south of plaintiff's land, though forbid by him (plaintiff); that he Kenny informed the mayor, and aldermen, and members of the street committee, who told him he might take soil from there and they would stand any damage for his so doing. That the soil removed from Duke street was taken to fill up and level on James street, but that Duke street was not cut up to the line of the plaintiff's land. Allan, street-inspector in 1852 and 1853, said he had in that character cut away soil from the street (Duke street), North of plaintiff's, but did not cut it down very much, four or five feet, nor within six or seven feet of plaintiff's. That defendants paid for that work. That before this a place had been cut nearly close to the plaintiff's fence near the corner of James street, but Duke street was not then a travelled road, that the natural level of the street (James street), sloped upwards to plaintiff's land which also sloped upwards, and that plaintiff could have got out from his land on the level of Duke street before the cutting, if his fences were removed. That Duke street is now a good travelled road: that plaintiff had not access to all parts of James street, but there might have been at the upper part near Robinson street, and there is not now much difference in the grade between the grade of plaintiff's land and the improved street: that before the improvement James street was scarcely passable, and now there is an excellent road: that according to the present grade plaintiff's land is now higher above the present level of the street than formerly: that land sufficient to support plaintiff's close and fences was left by this witness in what he did.

Another witness, McIntosh, stated that in consequence of cutting down James street, plaintiff's fences required support and the earth from his lot falls into James street, and so along Robinson street for sixteen or twenty feet: that there is no way to get from James street or Duke street into plaintiff's land except a foot stairway of thirteen or fourteen steps made by plaintiff, and that he must drive round to the rear to get a wagon in, and in winter, owing to the ice, the staircase

at times is often impassable: that at the corner, James street is four or five feet below the level of Robinson street: that in Duke street it is graded off to within one foot of plaintiff's fence, done by persons acting under the defendants' inspector.

Another witness (Nixon) proved that he put up a stone wall for plaintiff last summer to prevent the earth falling into James Street, which street is lowered ten feet, as also Duke Street, and at the corner near Robinson Street the grade of the street is five feet below the level of plaintiff's land. That it would cost £75 to put a wall along Duke street, and £80 to do so along James Street, and that plaintiff erected steps, and put up a wall two years ago worth £50.

That plaintiff erected his house in 1851 and 1852; and about one hundred feet from Robinson and James streets, and had to cut the slope along James Street to get a perpendicular or flat surface for his foundation walls. That the first five feet of plaintiff's land is light, and can only be secured by a retaining wall, below that level it is heavy and solid. This witness thought it would cost half the price of the land to cut it down to a level, for houses on James Street.

It appeared upon the whole of the plaintiff's evidence that his close was on the side or ascent of what is called the mountain, bounding the city of Hamilton on the south, and that his land, in common with all others, slopes or inclines downwards from south to north, and consequently the improved grades of the streets passing his property form inclined planes, and do not leave his land at a uniform higher level, but varying. At the close of the plaintiff's case the court adjourned till the next morning, and it was arranged by consent of parties that the jury should in the mean time view the premises.

For defendants, Kerr, the engineer, was called, and denied instructing or authorizing Kenny to work James Street, otherwise than the specifications &c., directed and required; but said that, being requested, he refused. That he planted posts as near the centre of James Street as he could for the guidance of the contractors. That they acted under his orders, and he acted under the specification. That opposite plaintiff's house, James Street had been con-

siderably lowered, and cut down before the work complained of was executed, in some parts one foot, in others six feet, in some, not at all, and that in doing the work below plaintiff's land, they had to fill up in some places; that four feet was the deepest cutting at any part along plaintiff's line; at the corner of Duke and James Streets it was one and a-half feet, and then from three to four feet. He described again the space left at the base and top of the cutting in James Street, and said the widest at the top would not exceed forty-six feet, and that all along the plaintiff's land a distance of at least seven and a-half feet was left, allowing for the natural slope of the land, and he thought none of the work done under his directions approached nearer; that there was previously very little cutting at the corner of Robinson and James Streets, and that they cut about two feet nine inches at the north side of Robinson street, and deepened it as they came north.

Hodgins, a surveyor, said he had taken the levels of James Street for sewerage, and that opposite plaintiff's it was not too steep, and was as favorable to plaintiff as it can be, being a grade of from one in twenty to one in twenty-six, whereas one in thirty is what it should be where practicable; but that plaintiff's property was not as well situated for the road as before the cutting, and which was so far injurious, and is less valuable for building purposes, but improved as a private residence; that the land itself was not less valuable, meaning apparently, the soil, as gravel &c. That the public must have had a very dangerous road if the alterations in the levels had not been made.

Mr. Mitchell, one of the street and side-walk committee, denied permitting or directing gravel to be taken from Duke Street by Kenny &c., but said that if he wanted such permission, he should memorialize the council. He further stated that he knew plaintiff's property ten years ago, when the original level was altered, and people took away gravel and sand from that part of the road, cutting it down six feet; and that the whole surface had been cut away across into another property. He described also how holes had been made by the excavation of sand; and that the cutting he spoke of did not extend to the south part of his land, but

from a little above the centre of his lot north. He thought James Street was an original allowance for a side line road. David White said James Street had been graded and levelled by subscription many years ago; and that people trespassed on the land now owned by the plaintiff, by taking away sand and gravel next the road, and cutting three or four feet deep.

The learned judge remarked upon the three counts in the declaration, and the only plea of not guilty, which denied the wrongful acts alleged, and that, according to the case of *Brown v. The Municipal Council of Sarnia*, 11 U. C. Q. B. R. 87, the statutes 14 & 15 Vic. ch. 54, did not apply for the protection of Municipal Corporations to entitle them to prove special matters under the general issue; at all events not after having referred to that act as the one upon which they relied; and submitted it to the jury to decide—1st, whether the plaintiff had proved the work complained of in the first and second counts to have been done by the defendants, saying it was clear that, as regarded James Street, the defendants had contracted with Kenny and Cain to grade and gravel it in front of and above and below plaintiff's property, and that defendants endeavoured to shew that all required to be done under it could not have extended so near the plaintiff's property as to injure his fences or cause the land to slide down or cause the specific injuries alleged in the counts, of which the plaintiff had given evidence with a view to prove the contrary.

For the purposes of this trial, he ruled that if the defendants authorised or directed the excavation, or contracted to have it done in such manner and to such extent as to produce the damage complained of, they were on those pleadings liable; but that if the contract specification, and engineer's directions were as their witnesses represented, then they were not liable under those counts, because their contractors, for their own purposes, exceeded the terms of the specification and the engineer's directions, and did that which occasioned the damage to the plaintiff by improperly, injuriously, and negligently excavating. That on the other streets the evidence connecting the defendants with the excavation com-

plained of was not so distinct, but there was evidence which he left to the jury subject to the same ruling as to James Street.

2nd—that as a general principle, applicable in the case more perhaps to the question of damages, the defendants, as a municipal corporation, under the act 12 Vic. ch. 81, had authority, and were particularly intrusted with the power to make and improve roads and streets within the limits over which their jurisdiction extended, being a public corporation for strictly public purposes. That on the two first counts, if the jury found the acts of the defendants were limited as they contended and endeavoured to prove, though what they did rendered access from plaintiff's close to the highway as constructed difficult or more limited than before, or than in the natural state of the ground, and so cause some damage in law, and also in fact, yet such damage was not recoverable; wherefore if the defence was established on such principles, in fact, the jury were told to find for defendants, but to find for plaintiff if the work was done as he contended, and injurious, as represented specifically in the declaration. As to the third count, that nothing was in issue but whether the lowering of any of the streets was done by the defendants, or by their authority or direction, nothing else being denied by the plea of not guilty. That on this count the plaintiff seemed entitled to a verdict, with such damages as the jury thought had been done to the general value of the plaintiff's property—that is, to its fair marketable value &c.; also, to sever their verdict, if they found for the plaintiff, stating what they gave on the first and second counts, and to distinguish between general and specific damages in reference to the third count, &c. The plaintiff's counsel objected that the mere fact of doing the acts complained of without passing a by-law was a wrong, and that the jury should be so directed. The jury, after a short consultation, being out only a few minutes, found for the defendants.

In the following term (Michaelmas Term, 18 Vic., December 1854), *Read*, for plaintiff, obtained a rule on the defendants to shew cause why such verdict should not be set aside and a new trial granted, as being contrary to law and evidence,

and the judge's charge, and also for misdirection, and for the reception of improper evidence for defendants, and upon affidavits filed.

The affidavits are of the plaintiff John McIntosh, and Isabella Reid, a sister of plaintiff, and represent that on the morning of the second day of the trial, before the opening of the court, the jury went to view the plaintiff's premises, and that Mr. Mitchell, one of the Municipal Council, and a member of the street committee, when the work complained as was done, was with them at the plaintiff's premises, conversing with one or more of the jurors, and speaking loud enough for all to hear him, and pointing out to them different spots, or places, &c. The object being to shew improper interference with the jury by persons interested in the defence on that occasion.

MACAULAY, C. J.—The 12 Vic., ch. 81, sec. 60, No. 1, empowers the municipalities to make by-laws for *opening, constructing, making, levelling, raising, lowering, repairing, improving, preserving, maintaining, &c.*, and for *stopping up, pulling down, widening, altering, changing or diverting* any new or existing highway, road, street, bridge, or other communication, &c.

Sec. 195, upon the passing of any *by-law* for the purpose of authorising the opening any road, street, or public thoroughfare, or of changing, widening, or diverting any road, street, or public thoroughfare, so as to cause the same or any part thereof to go through, or to be placed upon, or injuriously to affect the land or other real property of any persons, &c.; such persons may name an arbitrator, and give notice thereof to the corporation, &c., and the head of such corporation shall within three days name another &c., who may award the amount of damages, if any, to be paid to such person, &c.; and if the corporation neglect or refuse to arbitrate, such person may maintain a special action on the case at law against the municipality by which the by-law shall have been passed, &c. Sec. 197, benefit and advantage to be considered when it is for the *opening, widening or diverting*, any road or street, &c. The compensation words are *opening, changing, widening, or diverting, so as &c.*

The 13 & 14 Vic. ch. 15—The right to use as public highways all roads, streets, &c., vested in the municipality, and such roads, streets and highways shall be maintained and kept in proper repair, &c., by and at the costs of such corporations, &c.—16 Vic. ch. 181, (14th June, 1853), sec. 83, substituted for sec. 195 of 12 Vic. ch. 81.

13 & 16 Vic. ch. 109, sec. 85—Whenever any by-law, order or resolution shall be passed or adopted by any municipality whatever, and such by-law, order, or resolution has been quashed or declared illegal or void by any court having competent jurisdiction therein, the municipality by which such by-law, order or resolution shall be passed, shall alone be responsible in damages for any act or acts done or committed under such by-laws, order, or resolution; and any clerk, constable, or other officer acting thereunder, shall be freed and discharged from any action or cause of action which shall accrue or may have accrued to any person or persons by reason of such *by-law being illegal and void*, or having been quashed, &c.

Sch. A. No. 21, provides for quashing by-laws in reference to 12 Vic. ch. 81, sec. 155, and among other things enacts that no action shall be sustained for or by reason of anything required to be done under such *by-law*, unless such *by-law*, or the part thereof under which the same shall be done, shall be quashed in manner aforesaid one calendar month at least previous to the bringing of such action, with a proviso added for tendering amends, not saying within what time; and upon such tender being pleaded, if no more than the amends tendered shall be recovered, then, &c.

The King v. Commissioners of Sewers, County of Somerset (7 East, 71), Leader v. Moxon (3 Wil., 461-6-7).—The statute 11 Geo. III. ch. 21, empowered the *commissioners* to *cause, order and direct* the street to be paved, sunk or altered; and it was contended the power to alter gave power to raise, with appeal to Quarter Sessions for anything done under the act, &c., but with power only to give costs, not *damages*—per Blackstone, J., S. C. 2 W. B., 924.

The Governor & Co. of the Plate Glass Manufacturers v. Meredith (4 T. R. 794).—The words of the act were—paved,

repaired, raised, sunk, or altered, and the defendants had raised the pavements. Sec. 46 contained a compensation clause, on which Buller, J., and Groves, J., relied, where the pavement was *necessarily raised or lowered*—*Boyfield v. Porter* (13 East. 200), *Roberts v. Reid* (16 East. 216), *Gillin v. Boddington* (1 C. & P., 541), *Rex v. Commissioners of Sewers, Pagham, &c.*, (8 B. & C., 356). Using a canal-way wider or deeper—*Rex v. The Justices of Glamorganshire* (7 B. & C. 722), *Sutton v. Clarke* (6 Taunt. 29, S. C. 1 Mar. 429), *Jones v. Bird* (1 D. & R. 497, S. C. 5 B. & A. 837), *Mathews v. West London Water Works Co.* (3 Camp. 408), *Boulton v. Crowther* (2 B. & C. 708, S. C. 4 D. & R. 195), under 8 Geo. IV. ch. 126, sec. 85.

The trustees were empowered to *make, divert, shorten, vary, alter* and improve the course or path of any of the roads under their care &c.; much in point, if plaintiff not entitled to compensation—*Humphrey v. Mears* (1 M. & R. 187), *The Grocers' Co. v. Dunn*, antecedent cases reviewed (3 B. N. S. 34), *Reg. v. Manchester & Leeds R. W. Co.* (8 Q. B., 528), *Peters v. Clarson* (7 M. & G. 548, S. C. 8 Jur. 648), *In re Armitage* (Ambler 295). Upon motion to quash a writ *ad quod damnum*, the object being to make a wooden wagon-way in a lane of 320 yards in length, it was called "*changing the condition*" of the road.—*Brown v. Clegg* (16 Q. B. 681), *Overton v. Freeman* (8 Eng. Reports 479, S. C. 16 Jan. 65, S. C. 11 C. B. 867); as to the side roads taking earth, &c., 9 Moore 226, *Hall v. Smith* (2 Bing. 156), *Humphreys v. Mears* (1 M. & R. 187), *Peachey v. Rowland* (13 C. B. 182), *Rex v. Commissioners of Sewers, Pagham, supra* (8 C. B. 355), *Glover v. North Staffordshire R. W. Co.* (16 Q. B. 923-4), *Reg. v. Eastern Counties R. W. Co.* (2 Q. B. 347, S. C. ib. 569), *Caledonia R. W. Co. v. Ogilvie* (25 vol. Law Times, 633, 19th May, 1855, H. of Lords, page 1067). Not necessary to allege a by-law in pleading.—*The corporation of Ipswich v. Martin* (Cro. Jas. 411), *The Dean of Windsor v. Gover* (1 Sand. 804), *Arnold v. The Mayor of Poole* (4 M. & G. 860), *Brown v. Municipal Council of Sarnia* (11 U. C. Q. B. R. 87), *Kerby v. Grand River Navigation Co.* (ib. 334), *Farrell v. Municipality of London* (12 ib. 353), *Yonge v. Grand*

River Navigation Co. (ib. 75), *Ellis v. The Sheffield Gas Co.* (18 Jur. 146, S. C. 32 Eng. R. 198), *Dennis v. Hughes et al.* (8 U. C. Q. B. R. 444), *Wilson v. Port Hope* (10 U. C. Q. B. R. 411.)

The first consideration is whether had there been a by-law, the facts in evidence present a case which would have entitled the plaintiff to the compensation under the 12 Vic. ch. 81, sec. 195, and 16 Vic. ch. 181, sec. 88, had a by-law been passed; and upon the best attention I can bestow upon the question, I am not able to satisfy myself that the facts bring the acts complained of within the words *opening, changing, widening or diverting*, the road. The word "opening" seems to relate to the original opening of a road to be used as a highway, the word "changing" to some deviation therein, and not a mere alteration of the level by raising or lowering it upon the same line and within the same breadth; "widening," of course, applies to an enlargement of the width; and "deviating," to an alteration or deviation, or successive alterations or deviations in the line or course of the road from one direction to another. I have hesitated upon the force of the word "changing," for a road may be said to be changed on the same line as from a rough original road to a turnpike or to a macadamised or plank road, and from a free to a toll road; but the difficulty is to hold that macadamising, which necessarily required more or less change of the level or grade of the line of road, constituted a "changing" within the true intent and meaning of the compensation clauses. The 12 Vic. ch. 81, sec. 60, No. 1, mentions levelling, raising, lowering, altering, &c., and changing or diverting, which seems to indicate that changing meant something different from levelling, raising or lowering, or altering; at all events such alterations are termed changing the condition of the road, not changing the road itself; and I do not feel authorized, in holding that they are to be understood in the same sense, or that the word changing includes levelling, raising, and lowering, and more, or that it does not mean exclusively some other alteration. I adopt the conclusion, therefore, that the plaintiff is not entitled to claim compensation under the statutes. The improvements made in public highways may

often prejudicially affect individual proprietors, whose lands abut upon such roads, and compensation might often be just, and in England seems at times to be provided for; but if intended to be granted, the intention of the legislature to that effect should be more explicitly expressed. At present it appears to me the legislature did not mean to acknowledge in the proprietors of lands bounded by public roads a vested right to have such roads maintained at the existing level, however inconvenient in its use as a public highway, or to grant compensation for such alterations, so long as the original line of road was adhered to, and no encroachment made upon the soil of such adjacent proprietors; and that consequently compensation had not been reserved in those cases where (without touching the adjacent closes on the one hand, or deviating from them on the course of the road on the other) the levels only have been raised or lowered, whether in turnpiking, macadamizing or planking—such alterations not being considered infringements upon vested private rights, entitling the parties suffering injury, loss, or inconvenience, to compensation.

If entitled to compensation, a question would arise, whether the plaintiff's remedy was restricted to the course pointed out by the statute. If a by-law had been passed, I apprehend such would have been the consequence; but in the absence of one, the plaintiff would seem left to a common law remedy, if he had any: the want of a by-law deprives him of the opportunity of raising the question of statutory compensation in direct terms. If not a case for compensation, the next consideration is, whether the plaintiff can maintain an action on the case for consequential injury, if he has sustained a damage for which he could recover at common law against individual wrongdoers under like circumstances. This raised the question whether injuries of the kind complained of, if otherwise actionable, can be inflicted by the municipality of the city justifiably, without passing any by-law to authorize and require the work to be done. There was an order or resolution of the municipal council for that purpose, and a regular sealed contract entered into for its performance, sealed by the contractors if not by the defendants; and it is seen that the 35th section of

the 14 & 15 Vic. ch. 109, speaks of by-law, order, *and* resolution, by-law, order, *or* resolution, and of by-law alone; while schedule A., No. 21, mentions by-law only.

This statute, by analogy to justices of the peace and constables executing their warrants, seems to extend protection to clerks, constables, or other officers acting under by-laws, orders, and (or) resolutions similar to that afforded to constables by other statutes, and to refer injured parties for redress to actions against the municipality exclusively; it moreover extends protection to the municipality, so far that no action shall be sustained for or by reason of anything required to be done under any by-law, unless it shall be quashed one calendar month at least previous to such action being brought, with leave to tender amends and plead it; while *orders or resolutions* may apparently be declared illegal or void, by any court of competent authority in the premises, though not previously quashed. If there be no by-law, of course no by-law can be quashed, nor can anything be required to be done under it. Then, is every order or resolution a by-law, and are they identical, if duly *sealed and signed* (12 Vic. ch. 81, sec. 198, and 5 Ex. R. 61), and otherwise sufficient on the face of it? I suppose it would be such.—Hopkins v. Mayor of Swansea (4 M. & W. 680-8), Dunston v. The Imperial Gas Co. (3 B. & Adol. 125), Gosling v. Veley (7 Q. B. 451).

But a mere order or resolution of the municipal council, not duly authenticated, is not a by-law under the 12 Vic. ch. 81; for section 198 requires certain formalities to be observed, such as sealing and signing—10 U. C. R. Q. B. 411. It is said the municipal council are neither *the* corporation nor *a* corporation—Reg. v. Mayor of Bridgewater (10 A. & E. 286), Regina v. York (2 Q. B. 850), Regina v. The Inhabitants of St. Edmunds (2 Q. B. 73), Regina v. Dunn (5 Q. B. 963). But it is the governing body of the corporation—Regina v. Ledgard (1 Q. B., 619). And all the powers of the corporation (that is, the inhabitants of the city, &c.) shall be exercised through and in the name of the municipality of such city, &c.—12 Vic. ch. 81. It is therefore the legislative and governing body. As to a quorum, see 12 Vic. ch.

81, sec. 168—16 Vic. ch. 181, sec. 30. If the order or resolution under which the work in question was contracted for and executed was not a valid by-law within the 12 Vic. ch. 81, sec. 60, No. 1, it would not be in itself a sufficient authority if a by-law was necessary. And if there was no sufficient authority conferred independently by any by-law, I entertain the opinion that although the acts complained of were confined to lines of road or streets that were public highways and were for the improvement of the public easement, still for a consequential injury so directly affecting the plaintiff's property and himself as the occupant thereof, that an action on the case would lie at his suit against mere wrongdoers for like acts, and against defendants, if to be regarded as wrongdoers under the circumstances in evidence. I find the question whether work of the kind in question can be justified without a by-law when it infringed upon private rights to a degree that would entitle the parties injured to actions at common law against wrongdoers, very difficult to decide satisfactorily; so much may be said in favor of a conclusion either way when the party would not be entitled to compensation under the statutes—that is, if a by-law had been passed. I am, however, disposed to think that in such circumstances a by-law is essential. The corporation (that is, the inhabitants at large as a corporation) possess no direct powers of the kind, nor did they pretend to exercise them except through the municipal council; and in conferring powers upon the council, the legislature has not said that they may raise or lower public streets, &c.; but that they may make by-laws for that purpose, whence it is argued that, being empowered to pass by-laws for such purposes, they can justify the act without a by-law, when prosecuted civilly as wrongdoers, and the act complained of did not constitute an indictable nuisance to the public easement or highway, but was a benefit thereto.

The defendants, however, rely upon the 13 & 14 Vic. ch. 15, and their right to give the special matters in evidence under the general issue under the 14 & 15 Vic. ch. 54. If the evidence warranted the inference that the work done under the contract with the defendants was a duty incumbent upon them as being bound to maintain and keep the road in

proper repair at the peril perhaps of an indictment or an action if they did not do so, I think they may well justify such repairs without a by-law, having in fact done it, not under a by-law, but in obedience to a statute of the Provincial Legislature. The jury seem to have taken this view of it; and the verdict being consistent with the merits, inasmuch as the defendants acted *bona fide*, and what they did was a decided improvement of the street, and for which the plaintiff could have maintained no action had a formal by-law preceded the execution of the work, and as he would not be entitled to compensation had a by-law been passed, it perhaps becomes a matter of discretion with the court whether the verdict ought to have been disturbed, unless there was misdirection upon a point so material as to require it on that ground; the defendants ought only to be liable for what their contract required to be done—*Peachey v. Rowland*. (13 C. B. 182); and for any excess in the performance of the work by the contractors, injurious to the plaintiff, and not required or directed to be done by the defendants, the plaintiff's remedy would be against the person who did or caused the injury. That an action like the present may be maintained against a municipal corporation—that is, an action on the case for a tort, whether for non-feasance or mis-feasance—I expressed my opinion, in the case of *Croft v. Town of Peterboro'*, upon what I considered sufficient authority, and need not therefore do more at present than to refer to that case upon the general question, and also upon the point above mentioned; also referring to my observations in that case in reference to the cases, *The King v. The Commissioners of Sewers for Pagham*, (*supra*, 8 B. & C. 355), *Glover v. The N. Staffordshire R. W. Co.* (16 Q. B. 923.)

The evidence would shew a wrong and damage committed to the plaintiffs, though not a criminal wrong to the public, and such a wrong as would entitle him to an action at common law had no statute been passed on the subject.

If no private right of the plaintiff has been infringed, he has nothing to complain of if it has the importance of a by-law (if not otherwise justifiable becomes material). The statute does not say the municipalities may raise, lower or

alter roads, &c., leaving it to themselves to execute such authority their own way, but merely enacts that they may pass by-laws for such purposes. It is a legislative power that is conferred, not an executive one. They may by law require the work to be done; they are not empowered to execute such work themselves *ad libitum*, without any previous by-law on the subject. The protection of the corporation, as well as of private rights, seems to require a strict adherence to the requirements of the law. If by-laws are passed, they protect the corporation until quashed, and exonerate those who execute them from responsibility; they protect individuals when they are entitled to claim compensation under them, or if not, they enable them to apply to be heard against them, if apprised of their being proposed, or at all events move to quash them if they authorise an injurious violation of their rights to a degree rendering them illegal. But if the municipal council can execute public works of the kind without by-laws, they may involve the corporation in responsibility, civil or criminal, for debts or for tortious acts incurred or committed through the members of the council, their officers or servants, or they may inflict private injuries with impunity. Suppose in this case what was done amounted to a public nuisance, instead of a public benefit, could the defendants be indicted? I suppose they could under the 13 & 14 Vic. ch. 15, if not otherwise. It is contended that corporations are not liable on contracts entered into by their officers on their behalf, even though executed by the contractor, because not made under the seal of the corporation. If so, upon what principle can they justify such acts when injurious to individual corporations except on the same ground, that of non-liability, because not authorised under seal, but they may be liable for torts not so authorised. If one street may be raised or lowered to the positive damage of one or more householders inhabiting the line of such street, so may all, and if by one municipality so by all; and it would follow that the county council, as well as those of cities, towns and villages, might change the condition of the roads under their jurisdiction, &c., without by-laws. I cannot think this was intended. If by-laws may be dispensed with so may penal contracts, and

in the absence of an explicit by-law, followed by a sufficient contract and specification, what is to be the test of what the municipality directed to be done as compared with what their contractors, officers or servants, may have done? And a dispute on the point arises in this very case, although there was a specific contract. The plaintiff complains of two principal descriptions of injury: 1st, the removal of the natural support to the soil of his close, whereby much of it has slid or fallen away; 2nd, the rendering of access to his premises much more inconvenient, and rendering it necessary for him to incur expense to make them accessible at all on those portions which butt upon King street and the other streets that have been lowered injuriously to him, and the evidence went to shew damages in both respects.—14 & 15 Vic. ch. 109, sec. 35, and Sch. A. No. 21; *The Queen v. The Eastern Counties Railway Co.* (2 Q. B. 347), *Reg. v. The Manchester & Leeds R. W. Co.* (3 Q. B. 528).

My present impression is, that whenever the acts to be done by the municipality will invade private rights, which may be so invaded legally through the medium of by-laws, and for which, if not legalized by the statutes creating, or the powers conferred upon, the corporation, the party injured may maintain an action against the wrong-doer, a by-law is essential to enable the municipality to justify the act, unless it can be shewn to be a repair of the highway, &c., under the 13 & 14 Vic. ch. 15.—*Goszter v. The Corporation of Georgetown* (6 Wheaton, S. C. U. S., Marshall, J., 1821.)

Whether the work done constituted a repair or not, does not appear to have been distinctly raised at the trial. It formed a mixed question, and the jury seemingly considered it fairly within the statute as a repair of the road. I have not been able to satisfy myself that it can be in strictness regarded as such a repair, but that it was rather an alteration or improvement in the condition of the road within the discretion of the defendants to make through a by-law, but not incumbent upon them at the peril of prosecution under the 13 & 14 Vic. ch. 15. When I had got this far it occurred to me, whether the defendants could give the special matter in evidence under the statute 14 & 15 Vic. ch. 54, and if so,

whether they were not entitled to notice of action, in which event a new trial, if granted, could be of no ultimate avail to the plaintiff; and at the request of the court the case was spoken to again on this point, and the course taken at *Nisi Prius* to be further considered. If not within the protection of this statute, I do not see under what authority the defendants could be permitted to give the special matter of defence or justification relied upon in this case in evidence without pleading it specially, and they refer to no other statute but the one last above mentioned. If, on the other hand, they could give the special matter in evidence under the plea of not guilty per statute, referring to that act, they would be entitled to notice of action. It is said such an objection was not taken at the trial, but the learned judge who tried the cause ruled that they were not within the statute at all. They did however rely upon it in their plea, and whether entitled to do so was raised as a question in relation to the special matter of defence; and if a new trial was had, the other objection of want of notice would of course be made. It is material therefore to decide the point.

The 12 Vic. ch. 10, sec. 5, No. 8, enacts that the word "person" shall include any body, corporate, or politic, or party, &c., to whom the context can apply, according to the law of that part of the province to which such context shall extend.

The P. S. 7 W. IV. ch. 14, secs. 2, 14 and 19, contain a similar provision.—See 12 Vic. ch. 84, sec. 82.

The 14 & 15 Vic. ch. 54, sec. 2, enacts that no writ shall be sued out against any justice of the peace, or other officer or *person* fulfilling any public duty, for anything by him done in the performance of such public duty, whether it arises out of the common law, or is imposed by act of parliament, &c., unless notice in writing be given at least one calendar month, &c.

Sec. 3 provides for tendering and pleading tender of amends.

Sec. 5, For pleading the general issue, &c.

Sec. 6, For payment of money into court without leave of a judge.

See 8, For limitations of actions to six calendar months after the act committed, &c.; also 16 Vic. ch. 180, sec. 16.

The Court of Queen's Bench in the case of *Brown v. The Municipal Council of Sarnia* (11 U. C. Q. B. R. 215), held that the word "person" did not extend to municipal corporations, &c.

The 7 W. IV. ch. 14, secs. 14 and 19, is material to be remembered, as also 3 W. IV., ch. 7, sec. 12; and ch. 68, sec. 28, as to service of process, &c.; and 12 Vic. ch. 56, sec. 34, 12 Vic. ch. 84, sec. 82; 13 & 14 Vic. ch. 14; 12 Vic. ch. 81, sec. 155; 14 & 15 Vic. ch. 109, sec. 35, and sch. A., No. 21, ib. ch. 51, sec. 20; I. S. 8 & 9 Vic. ch. 87, sec. 117.

Reference may be made to *Fisher v. Thames Tunnel R. W. Co.* (5 Dowl. 778), *Boyd v. Croydon R. W. Co.* (4 Bing. N. S. 669, S. C. 6 Scott 46), *The Kennet & Avon Canal Co. v. The Great Western R. W. Co.* (7 Q. B. 825), I. S. 11 & 12 Vic. ch. 63, sec. 139), *Davis v. The Mayor of Swansea* (8 Ex. R. 808), I. S. 5 & 6 Vic., ch. 89, sec. 52, 9 Vic., ch. 48, sec. 18), *Kent v. The Great Western Railway Co.* (3 C. B. 714), *Parker v. The Great Western Railway Co.* (7 M. & G. 258), *Palmer v. The Grand Junction Railway Co.* (4 M. & W. 749), *Carpue v. The London and Brighton Railway Co.* (5 Q. B. 747), *Eastham v. Blackburn Railway Co.* (9 Ex. 758), *Jeffries v. Williams* (5 Ex. 792).

As to the time of the act or fact committed, see *Lord Oakley v. The Kensington Canal Co.* (5 B & Ad. 188), *Oane v. Chapman* (5 A. & E. 647), *Roberts v. Reid* (16 East. 216), *Gillon v. Boddington* (1 C. & P. 541), *Marsh v. Boulton* (4 U. C. Q. B. R. 354), *White v. Clark* (10 U. C. Q. B. R. 490); and cases referred to in *Croft v. Town Council of Peterboro'*, ante p. 141.

I cannot but think the defendants entitled to the protection of the statute 14 & 15 Vic. ch. 54, if liable to be treated as wrong-doers in a civil action like the present and under the present circumstances. The reasons and views stated by Mr. Justice Burns in delivering the judgment of the court of Queen's Bench are of great force, and it is with much hesitation that I adopt an opposite conclusion. My impression is, that the defendants were entitled to notice of action notwithstanding the

argument, that if so, they would have been equally entitled to it whether a by-law had been passed and afterwards quashed, in which event the action might be outlawed before steps could have been taken to quash the same. By-laws, as affording protection to those enforcing or acting under them, bear analogy to convictions, which afford a like protection until quashed; and yet justices and others having acted under them are entitled to notice of action, and such action is limited in point of time.—16 Vic. ch. 178, sec. 26; 16 Vic. ch. 180, secs. 2, 7, 8, 9, 10.

If a by-law had been passed, no action could have been brought without its being quashed a full month before such action. In such an event the municipality would of course know, and have notice by the statute already mentioned, that no action could be brought within a month, and that they might tender amends in the meantime. But where there is no by-law, and where the act is done under the 13 & 14 Vic. ch. 15, I do not see why the municipal corporation (if liable at all) should not be entitled to notice of action, coming, as they would fully, within the spirit of the protecting statute.

The individual members of the municipal council, when acting *bona fide* in the execution of by-laws or other public duties, would be entitled to notice; and if the members acting severally would be so entitled, on the same principle the corporation would be entitled when the members of the council acted collectively in relation to the subject matter, if (as already observed) the corporation be liable at all for the tortious acts complained of. I also consider the defendants entitled to give the special matter in evidence under the general issue; and although the learned judge at *Nisi Prius* held a contrary doctrine, the special matter seems to have been admitted, and the whole merits of the defence gone into, and the learned judge held, that the defendants had power under the 12 Vic. ch. 81 to make and improve roads and streets, and that if the jury found their acts limited, as they contended and endeavored to prove, though it rendered access from plaintiff's close to the highway difficult or more limited than before, &c., so as to cause damage in law and in fact, yet such damage was not recoverable; wherefore, if the defence was established on such principles,

the jury were told to find for defendants, but to find for plaintiffs if the work was done as he contended, &c.; the distinction being between the work expressly contracted to be done on the defendant's part and what was actually done in excess thereof by their contractors. I am not able to subscribe to this doctrine to the full extent. If what was contracted for came within the 13 & 14 Vic. ch. 15, as a necessary or incumbent repair of the roads only; or, if a by-law, based upon previous survey or professional report of their surveyor, had authorised and governed the contract for altering the level of the road beyond mere repairs, I agree that the defendants would not be liable for deficiencies or excess in the execution of the work not authorised or directed by them, but those only who transgressed and inflicted the damage upon the part of plaintiff extra the contract.

But, when the defendants, without being required by the statute or authorized by a by-law, direct the performance of works, in the *bona fide* execution of which their officers, servants or contractors commit actionable injuries to the property of others, I apprehend they would be liable. If the agents or contractors, wilfully and of their own wrong, executed what the defendants directed or required, it would be otherwise. As applied to this case, I am disposed to think the defendants liable for the consequences of the work done on King street, but I do not think them liable for independent acts in other places or upon other roads, if not embraced in those contracts, even though verbally sanctioned irregularly by one or other of the aldermen in casual conversation, and not sitting or acting in council or under the orders thereof. I am of opinion, therefore, that in my view of the legal rights and liabilities of the parties, there was, strictly speaking, misdirection in reference to the work done upon King street and its injurious consequences to plaintiff's premises, both as to withdrawing support from the soil and destroying access to and from his lands and house, &c., by such road or highway. At the same time, however, since there was a special contract on the occasion shewing all that the defendants desired to have done; and as what they so required might have been legally authorised by the formal passing of the by-law, in which event the plaintiff would be

clearly without redress in this form of action; and as the omission of a by-law was probably a mere inadvertence; and as the jury seem to have been of opinion that the defendants did not, in what their contract required, cause anything to be done otherwise injurious to the plaintiff than as the lowering of the road rendered access to his house and grounds more difficult and entailed expense upon him in rendering it accessible, and as to such lowering that it was not only necessary to admit the grading and macadamising the road to the great improvement of the public way, but fairly within the statute 13 & 14 Vic. ch. 16, as a repair of the road; I am not prepared to hold that after the whole merits were gone into and fully discussed and submitted to the jury, we are bound to set aside the verdict for misdirection under the circumstances in evidence, and in the way it was left to the jury, merely because a formal by-law was not passed, upon the absence of which alone the plaintiff is at last obliged to rely in support of the action. If there had been a by-law, I do not think the defendants could be held liable for excess, if any, beyond what the by-law and contract presented; and the defendants having acted in good faith for the improvement of the public highway, and in the discharge of a public duty, though, as it seems to me, informally and injuriously to the plaintiff; and as the jury, upon evidence more or less conflicting, found for them; there is much to be said in favor of letting the verdict rest now, even if I did not think the defendants entitled to the protection of the 14 & 15 Vic. ch. 4; upon which, however, my opinion is to be understood as more especially founded. I mention this, because of the propriety felt of not expressing myself conclusively upon the other important and difficult question which the case has presented.

If the plaintiff had shewn that what the defendants did was a public as well as a private nuisance, the complexion of the law would have been materially altered—for then, instead of being a repair or improvement of the road, it would have been the reverse, and they would have exceeded the just exercise of their powers, even though a by-law had been passed, and could have claimed no protection under the 15 & 16 Vic. ch. 15; and instead of an informal exercise of their legal power, it would have been a positive violation of their duty.

As to the last count, the verdict was certainly against the direction of the court at *Nisi Prius*; but the merits of this action did not turn upon that count—all the evidence related to the prior counts; and if the defendants could justify themselves under those counts, the plaintiff would not be entitled to apply the facts or causes of action to this count. I look upon it therefore as not involving the merits of the case, and not a case sufficient to require us to set aside the verdict, for under it, had the jury found for the plaintiff, the damages could not have been expected to be more than nominal.

MOLÉAN, J.—The passing of a by-law, without anything more, can never raise, or lower, or improve a street; the corporation, after all, must act ministerially in carrying out by-laws; their powers are ministerial as well as legislative, and when the law imposes upon them the duty of making, improving, and keeping in repair the public highways, they require no by-law, as it appears to me, to enable them to do what is enjoined upon them as a duty, and for not doing which an action could be maintained against them: I have already expressed this opinion in the suit of *Croft v. The Town Council of Peterboro'*, when that suit was before us on a motion to set aside a non-suit. The proceedings of the defendants, of which the plaintiff complains, have been in strict accordance with the views expressed at that time, and I have therefore no difficulty in joining in a judgment that this action cannot be maintained, without reference to the other grounds which the learned Chief Justice has so fully and ably stated in his judgment. I must however, state, that with respect to these also, I concur in the view which he has taken. In the case of *Brown v. The Municipality of Sarnia*, I ruled at *Nisi Prius* that the defendants were entitled to a notice of action; and though that ruling was held to have been erroneous, I have not been able to satisfy myself that it was so.

I think the plaintiff cannot succeed in this action, and that the rule must be discharged.

RICHARDS, J., concurred.

Per Cur.—Rule discharged.

MOORE V. LOGAN.

Damages—Measure of.

Declaration states that plaintiff agreed with defendant to deliver to him on or before 1st of August, at &c., 500 cords of wood, at 14s per cord, to be paid for by defendant monthly, according to the quantity from month to month delivered: then avers delivery of 125 cords before 1st of August, and although more than one month had elapsed before the making of said agreement, and although plaintiff was ready and willing to deliver the residue of said 500 cords, yet defendant would not pay the price for the quantity that had been delivered, nor accept the remainder, nor allow plaintiff to deliver the same.

Held, that the measure of damages was the value of the quantity of wood delivered at the contract price, and also the difference of profit on the residue of the wood between the current selling price and the contract price.

Writ, 27th April, 1855. Declaration, 5th May, 1855.

First count states—That on 27th January, 1856, defendant agreed with the Grand Trunk Railway Co. to furnish to them one thousand cords of hard-wood, &c., to be delivered at the village of Rockwood on or before the first of August, 1855, subject to inspection of an officer of the company; and plaintiff afterwards agreed with defendant to deliver to said defendant at said village, to wit, five hundred cords of the said one thousand cords, of the quality and description aforesaid, and such as would pass inspection of the officer aforesaid, on or before the first of August, 1855, at fourteen shillings currency per cord, to be paid by defendant to plaintiff monthly, according to the quantity from month to month delivered by plaintiff and approved of as aforesaid; in consideration whereof plaintiff promised to accept the same and pay therefor monthly, &c. Then avers delivery of one hundred and twenty-five cords duly approved, &c. before the first of August, and although more than a month had elapsed since the making of said agreement, and although plaintiff hath at all times been, and *still is*, ready and willing to deliver at the place aforesaid the residue of said five hundred cords of wood &c., of which defendant had notice, yet defendant, though often requested, would not pay the price agreed upon for the quantity that had been delivered, but refused so to do, and will not accept any more of the said wood from plaintiff nor allow him to deliver the same, &c., in fulfilment of his agreement; but positively refuses, &c. Then alleges large expenditure in horses, cattle, wagons, &c., purchasing

standing trees and wood &c., for the purposes of fulfilling said contract, whereby plaintiff hath lost great gains and incurred great expenses.

Second count—Goods sold and delivered, money paid, account stated.

Pleas: First—Non-assumpsit, except as to £56 10s. paid into court.

Second—Except as to £56 10s., denies delivery of any wood of the quality, &c.

Third—Except as to £56 10s. denies acceptance or approval of the wood mentioned in the first count.

Fourth—The £56 10s., brought into court.

There was evidence of part delivery, and of defendant's refusal, on or about the 15th of March, 1855, to go on, and plaintiff's readiness, &c., is not denied.

The learned judge left it to the jury to find the difference between £56 10s. and one hundred and thirteen cords, at fourteen shillings a cord, or £22 12s.; also a profit (or loss) on residue of five hundred, less one hundred and thirteen cords, reckoned upon the principle of allowing plaintiff fourteen shillings a cord, less the actual price of wood as per contract, delivered at the time and place that had been agreed upon.—*Philpotts v. Evans*, 5 M. & W. 475; *Leigh v. Paterson*, 8 Taunt 540; *Reg. v. The London & Brighton Railway Co.*, 15 Ju. 377, S. C. 6 Eng. R. 230; *Cross v. The Ambergate Railway Co.*, 17 Q. B. 127; *Elderton v. Emmens*, 4 C. B. 479, 2 E. & B. 678.

Verdict for plaintiff £100.

Rule Nisi to arrest judgment, or for a *venire de novo*, or to reduce the verdict to £22 12s.

MACAULAY, C. J., delivered the judgment of the court.

I perceive no sufficient ground for arresting the judgment. The action is not prematurely brought. The contract being broken, the plaintiff was not bound to delay his action for any definite period of time, as a month afterwards.

The action is brought on the 27th of April, 1855, and the averment of a month having elapsed since the making of the agreement, if not material, may be rejected. The defen-

dant does not plead that the contract had not expired, and if the words, "*the making of said agreement*," after the word "*since*," could be rejected, all would be right: though, as it is, there may be room for objection unless cured by verdict. The agreement in effect is to pay at the end of each month for all the wood delivered within that month, not to pay a month after delivery; and if in the course of the month the defendant broke the contract and refused to go on, I do not see that the plaintiff was bound to wait till the month expired before instituting the suit. The agreement was broken and put an end to by defendant, so far as he could. The quantity of wood delivered up to that time was evidence of performance *pro tanto*. The action is not for the price of the wood as goods sold and delivered under the contract, but for damages for breach of contract; in which the plaintiff's damages, retrospective, as well as prospective, are recoverable. If at the trial the plaintiff proved any wood duly delivered and approved &c., he became entitled to include the amount in this action, and the payment of money into court implies that some had been delivered; more than the first month, since making the agreement, had elapsed. What the plaintiff delivered in point of actual quantity we do not know, nor whether it may all have been within the first month; and on this part of the rule the evidence is not before us, and it may be presumed nothing would be allowed for that was not proved. The plaintiff was not bound to delay his suit till August, nor do I see any sufficient ground for a *venire de novo*.

The way in which the learned judge left the question of damage to the jury seems quite consistent with the authorities—namely, the value of the wood delivered at the contract price, and the rate at which such wood could have been sold according to the contract rate at the time the contract was broken or to be performed; in short, the difference of profit between the current selling price and the contract price. See cases ante, and Phillips v. Huth (6 M. & W. 589), Valpy v. Oakley (16 Q. B. 941), Owen v. Rentle (14 C. B. 333), Peterson v. Ayre (13 C. B. 353), Barrow v. Arnaud (8 Q. B. 609), Paul v. Dodd (10 Ju. 335, 2 C. & K. 158).

I do not think we can reduce the verdict to the difference between the sum paid into court and the wood delivered, reckoned at fourteen shillings a cord, and being about £22; because, if the plaintiff is entitled to recover at all, he is entitled to prospective damages—a loss of profit as well as the price of the wood delivered; and on the other branch of the rule, his right to recover for the wood delivered is disputed on the ground that his claim thereto is defectively stated in the declaration.

On the whole, I think the rule ought to be discharged. The damages may be high—they are not moved against as excessive, nor can we say they are so; and my only doubt is whether there may not be more ground in the objection taken in arrest of judgment, than I have attached to it. It is beside the merits, and may, I think, for the reasons chiefly mentioned, be over-ruled. As to the averment that the plaintiff *still is ready*, &c., it cannot hurt his case; it shows his willingness to go on until the action was brought, to which period of time the averment relates, and may be rejected as surplusage, if it is to be understood as alleging a readiness from the time of suing out the writ, which was the commencement of the action, to the time of declaring, which used to be looked upon as the commencement, and may account for the use of the words “still is,” as in the present declaration.

MCLEAN, J., and RICHARDS, J., concurred.

Per Cur.—Rule discharged.

O'DONAHOE V. THE SCHOOL TRUSTEES OF SECTION No. 4, THORAH.

School Trustees.

Upon an application for a rule *Nisi* for a mandamus by the teacher of a school section against the trustees of such section, requiring them to levy a rate sufficient to pay the applicant the balance of his salary as a school teacher, recovered in the Division Court against former trustees; the court refused to grant such rule, it not appearing on the application when, for how long, and by whom the said teacher was employed.

Application by *M. C. Cameron* on the 4th Sept., 1855, for a rule *Nisi* on the said trustees, to show cause why a mandamus should not issue to them, requiring them to levy a rate,

or cause to be assessed and collected a rate, sufficient to pay the said O'Donahoe £26 8s. 6d., being the balance due him as teacher of the said section, and the balance of costs due on the judgment recovered by him for said salary, with costs of this application. It is stated in the affidavit of D'Arcy Boulton, Esq., attorney for O'Donahoe, that about the 21st August, 1851, said O'Donahoe obtained a judgment in the Eighth Division Court of York and Peel against William McCarkill, George Proctor, and Duncan Calder, trustees of School Section No. 4, township of Thorah, in an action on contract for £24 10s. 6d., debt, and £1 17s. 2d. costs—£26 7s. 8d.—against the corporate property of said trustees, ordered to be paid in one month; such judgment being recovered within the jurisdiction, &c. That execution issued thereon against the goods of said trustees as a corporation, returned by the bailiff made £1 4s. 6d. and no more goods. That on 29th April, 1852, the said judgment was duly certified into the county court, and *Fi. Fa.* issued thereupon against the corporate lands of said trustees for £25 7s. 2d., returnable 1st day of June term, 1853, returned, made £5 5s. 0d., and no more lands. That a summons was issued by the County Court judge under section 91 of Division Court Act of 1850, afterwards discharged on the ground of want of authority in the court, (date not stated.) That there is still due O'Donahoe £26 8s. 8d. That the school trustees of said school section have been frequently requested to pay said balance and have refused so to do, and still refused, and set him at defiance; that said trustees have no goods or lands whereof, &c. That the said debt was incurred by the above named trustees, as such trustees, on account of the salary of said O'Donahoe as teacher of the said school section; and that he, O'Donahoe, on several occasions requested the trustees of the said school section for the years 1853 and 1854 (not named), to levy a rate as by law provided, for the payment of said debt; and that the said trustees of the said years declined so to do, and as he believed so declined by reason of the ratepayers of the said section having met to consider the question whether the said bill should be paid or not, and decided at such meeting that it should not.

Affidavit sworn the 24th August, 1855.

MACAULAY, C. J.—Upon reference to the statute 13 & 14 Vic. ch. 48, sec. 12, No. 16; *ib.*, sec. 17, No. 5; sec. 6, No. 4.; secs. 17 and 6, No. 4; 16 Vic. ch. 185, secs. 6, 11, 15, 17, and 24; and the statute 13 & 14 Vic. ch. 48, sec. 6, No. 4, and sec. 12, Nos. 5, 7, 9 and 16,—upon which this application depends: and having carefully examined those clauses, we cannot find authority to grant this application. Nothing is laid before us to show when, where, or upon what terms, or for what time the applicant was employed to teach the school, and we are in effect called upon to enforce a Division Court judgment in favour of a school teacher against the trustees as a corporation by mandamus to them to levy a rate retrospective in its object.

The statutes confer certain powers and impose certain obligations upon the trustees, and if it be legally in their power and their legal duty to do what the mandamus is asked to compel, the statute seems to afford another remedy by action. If not legally so empowered and in duty bound to act, the court cannot confer authority by a writ of mandamus, nor will it grant such a writ to order the trustees to do that which it is not a duty incumbent upon them to perform.

Before we should be disposed to grant a rule to show cause, we should desire to hear it determined that no action does lie against the trustees individually. Although the court should consider it in their power to levy the rate required, such a suit ought to be instituted in the County Court; but if the trustees have been changed since the Division Court judgment was recovered, I by no means am to be understood as intimating that the action could be maintained against the trustees for the time being. We decline granting a rule on the facts before us; but the applicant can, if so advised, take the opinion of the Court of Queen's Bench on the subject next term, by moving that court for a mandamus, either on the same or upon additional facts.

MCLEAN, J., and RICHARDS, J., concurred.

Rule refused.

NASH v. BUSH.

Notice to produce—Opposite party—Examination of.

A notice served on plaintiff's attorney on the day of, and within one hour of the trial is too late to entitle defendant to give secondary evidence.

A plaintiff or defendant in a suit may be called as a witness by his opponent in the same manner as any other witness; that a party called as a witness under the stat. 16 Vic. ch. 19 is not entitled to any other notice, or to be sub-judged differently from any other witness.

ASSUMPSIT upon a promissory note made by defendant on the 31st October 1851 for £200, payable on or before the 1st January 1854 to John Ham Perry, or order, with interest, and endorsed by said Perry to plaintiff.

Plea—That after the note became due, and after the cause of action accrued, and before suit, to wit, on the 1st of February 1854, defendant delivered to plaintiff, and plaintiff accepted and received a covenant of defendant, whereby defendant covenanted to pay to plaintiff the sum of £226, with interest at ten per cent. yearly, on or before the 1st January 1855, in full satisfaction and discharge of the causes of action in the declaration mentioned.

Replication.—That defendant did not deliver, nor did plaintiff accept, the said covenant in full satisfaction and discharge of the said causes of action in the declaration alleged, *modo et forma* &c.: to the country and issue.

At the trial a promissory note was produced, dated 30th October, but in other respects corresponding with the one declared on.

Notice to produce a mortgage between the parties made the 1st February 1854 on lot 10, 14th concession Orillia. Notice dated 21st May 1855, the day of the trial, served one hour before on plaintiff's attorney, to whom it is addressed.

Secondary evidence of the mortgage was admitted, though objected to on the ground of the notice being too late.

Copy of an indenture, 1st February 1854, between defendant and plaintiff, conveying the lot above-mentioned in fee; proviso, to be void on payment of £226 with interest, thus,—on or before the 18th January 1855 (interest to be calculated from the 1st January last at ten per cent. per annum) according to the exigency of a certain promissory note made by the said party of the first part (defendant) to one John Ham Perry, and by him endorsed over to the said party of the

second part (plaintiff); said note however only bearing legal interest; and defendant covenanted with plaintiff well and truly to pay the plaintiff the said principal sum of money in the proviso hereinbefore mentioned, and interest at the time and manner hereinbefore appointed for payment thereof, without deduction, according to the true intent and meaning thereof with power to mortgagee to enter &c. in case of default after three months' notice, and to lease or sell &c. Mortgagor to possess &c. until default.—Verdict for defendant.

Rule Nisi to set the verdict aside on the grounds of being contrary to law and evidence and the judge's charge, and for the reception of improper evidence.

MACAULAY, C. J.—If the plaintiff thinks he can better his case at another trial, I think he is strictly entitled to it on the ground that the notice to produce the mortgage was served too late to make secondary evidence admissible, and because its production in proof was necessary in support of the defendant's plea, in order to identify the instrument mentioned in the plea and the promissory note therein referred to with the mortgage in question and the note declared upon.

I am also much disposed to think that the plaintiff was not compellable to be sworn at the defendant's call against his will, without being previously subpoenaed, or his attorney notified according to the statute 16 Vic. ch. 19, sec. 2.

It is, however, so much a matter of discretion with the presiding judge, that, having been sworn and examined, I do not know that it would constitute a sufficient ground for setting aside the trial, even if not strictly bound to have given evidence. It is not the same as if the application were to attach him for refusing to be sworn, and give evidence &c. when his right to decline would come strictly in issue.

As to the substance of the defence, I am at present disposed to think the note was merged if the note sued upon and the one mentioned in the proviso, and covenant contained in the mortgage, are identical in point of fact,—which of course is a question; for the note mentioned in the proviso is referred to as if to come due concurrently with the

time specified for its payment in the mortgage, whereas, the note declared upon; though between the same parties and for similar sums, was overdue long before the mortgage was given. If identical, then the endorser would be discharged, if not so already, as having endorsed without recourse; and as between the plaintiff, the holder; and the defendant, the making the covenant to pay is a higher security, and such security is co-extensive with promissory notes, it seems to come within the rule.—*Ross et al. v. Winans* (5 U. C. C. P. R. 183), *Mathewson v. Brouse* (1 U. C. Q. B. R. 272). It is inconsistent that the note at six per cent. interest, and the mortgage covenant at ten, should be both subsisting for the same demand at the same time, by agreement between the parties.

RICHARDS, J.—I have very little to add to what the learned Chief Justice has said, as I concur in opinion with him that there ought to be a new trial. I merely wish to say, I consider that the plaintiff or defendant in a suit may be called as a witness by his opponent precisely in the same manner as any other witness: that a party called as a witness, under provincial statute 16 Vic. ch. 19, is not entitled to any other notice, or to be subpoenaed differently from any other witness. I think the second section has particular reference to the mode of procuring the attendance of the party when his opponent wishes to call him as a witness, and the penalty to be imposed on him for non-attendance—viz., taking the cause as *pro confesso* against him.

McLEAN, J., concurred with RICHARDS, J.

MICHAELMAS TERM, 19 VICTORIA.

Present,—THE HON. J. B. MACAULAY, C. J.
 “ A. McLEAN, J.
 “ W. B. RICHARDS, J.

COLEMAN ET AL. V. McDERMOT ET AL.

Appropriation—Delivery and acceptance.

Defendants sold to plaintiffs, to be delivered at Port Hope on the first of June, two thousand barrels of Otonabee and Peterboro' mills flour, free on board; terms, cash on delivery or on warehouse receipt. The flour was not delivered on the first of June, but was deposited in Hackett's warehouse before and on the 6th of June, on which day a written order was given, addressed to Hackett at Port Hope, requesting him to deliver to defendants at Port Hope one thousand barrels of flour, Peterboro' and Otonabee mills, free on board, across the face of which W. C. wrote, "Mr. Hackett will please deliver the within flour to R. A. G. or order" (said R. A. G. being the broker acting in the transaction), and R. A. G. endorsed it in blank. On the 7th of June defendants wrote to R. A. G. inclosing the order for the flour and requesting him to remit the funds by express next day. On the 11th of June, R. A. G. telegraphed to defendants, "Money goes to-morrow, was ready first of June." On the 12th of June Perry, from Oswego, telegraphed to Hackett, "Minerva leaves to day for the other one thousand barrels, account of Coleman" (one of the plaintiffs). On the same day R. A. G. from Toronto, wrote defendants at Port Hope, that he enclosed £2125, being the last payment on the sale of the flour; on the 15th of June the plaintiffs presented the order of the 6th of June to Hackett, but was told that the flour had been burnt the preceding day: on the 16th of June the defendants were notified of Hackett's refusal to accept the order for the flour. It was proved that on the 8th or 9th of June the plaintiffs hesitated accepting the flour, the day for delivery having passed, but on the morning of the 12th of June plaintiffs paid the money and received the order of the 6th of June for the flour, which order had not been accepted by Hackett.

Held, That a specific one thousand barrels of Peterboro' and Otonabee mills flour having been deposited in the warehouse at Port Hope, and appropriated to the plaintiffs, and the plaintiffs having paid the price thereof and accepted the delivery order, the right of property therein passed to and vested in them, and that the property remained from that time at their risk.

First count special.—An agreement to deliver 4000 barrels flour, free on board, at 42s. 6d.

Breach.—Non-delivery of 1000 barrels. Also money had and received.

Special pleas.—Traversing the averments in declaration,

and alleging performance. Coleman and McIntyre were copartners in trade. Proudfoot joined them, or one of them, in this purchase, and the misjoinder of one plaintiff too many was objected to; but the main point was the question whether plaintiffs or defendants were liable to sustain the loss of 1000 barrels of flour, burnt at a warehouse of Hackett's in Port Hope. On 12th April 1855, Goodenough, a broker in Toronto, bought of defendants for plaintiffs 4000 barrels Otonabee and Peterboro' Mills flour, F. O. B., at 42s. 6d.; 2000 on or before 1st of May next, and 2000 on or before the 1st June next. Terms, cash on delivery or on warehouse receipts.

The bought and sold notes mention the purchase as being made on account of Messrs. Coleman & McIntyre, but in the margin of the broker's book Proudfoot's name is inserted.

The 3000 barrels had been delivered and paid for. The 1000 remaining were not delivered on the 1st of June, but were deposited in Hackett's warehouse at Port Hope before and on the 6th of June, on which day W. Cluxton gave a written order at Peterboro', addressed to F. Hackett, Port Hope, requesting him to deliver to defendants at Port Hope 1000 barrels flour, "Peterboro' Mills and Otonabee Mills," free on board, and you can charge me for wharfage, &c. Across the face of which defendants wrote, "Mr. Hackett will please deliver the within flour to B. A. Goodenough, Esq., or order," and Goodenough endorsed it in blank.

On 25th of May defendants, from Port Hope, wrote to Goodenough, inclosing Cluxton's order, "on our wharfinger here for 1000 barrels flour, &c., duly accepted, &c."

On 7th of June defendants, from Port Hope, wrote to Goodenough, "we beg to inclose order for the fourth and last 1000 barrels flour, sold by you for our account, please remit us the funds through the express that comes down to-morrow, and not to fail &c."

11th June, 1855.—Goodenough telegraphed to defendants. "The warehouse receipt only received on Saturday, after mails and boats had left—money goes to-morrow: money was ready 1st of June."

12th June 1855.—Perry, from Oswego, telegraphed to F. Hackett, "Minerva leaves to-day for the other 1000 barrels, account of Coleman."

12th June 1855.—Goodenough, from Toronto, wrote to defendants, Port Hope, that he inclosed \$2125, being last payment on the sale of 4000 barrels of flour. Mr. Proudfoot makes some claim for the detention of the vessel sent for the last 1000 barrels, &c.

15th June, 1855.—Plaintiffs presented the order of 6th of June to Hackett, but were answered that the flour had been burnt the preceding day, as the fact was. Perry stated that on the 12th of June he was directed by plaintiffs to charter and send a vessel from Oswego to Port Hope for 1000 barrels of flour to be there delivered to them by defendants; that on the same day he chartered the *Minerva*, which sailed on the 13th of June for Port Hope for the flour, or certainly on the 14th, and reached Cobourg about twelve o'clock, noon, that day.

16th June, 1855.—Proudfoot notifying to defendants, Hackett's refusal to accept Cluxton's order.

The flour was in fact in the warehouse on the 6th or 7th of June, and burnt on the 14th. Proudfoot at first, on the 8th or 9th of June, hesitated accepting the 1000 barrels, the day for delivery having passed, and claimed damages; but on the morning of the 12th McIntyre paid the money, having first seen the order of the 6th of June, which not being accepted by Hackett, McIntyre at first objected to, but, being assured of defendants' responsibility, paid the money and received the order.

The evidence more fully was to this effect: The plaintiffs Coleman & McIntyre were copartners in trade, carrying on business at Dundas. Proudfoot resided at Toronto. The defendants were copartners in business at Port Hope. Cluxton, hereinafter mentioned, carried on business at Peterboro', where the *Otonabee* and *Peterboro'* Mills were situated. Hackett was a warehouse-keeper at Port Hope.

Mr. Goodenough, a flour broker, residing in Toronto, stated that he negotiated the sale of the 4000 barrels of flour

mentioned in the bought and sold notes. That he did not at first know McIntyre in the transaction, though the names of Coleman and McIntyre only are mentioned in the bought and sold notes. That he afterwards understood Proudfoot was concerned with Coleman in the purchase, as Coleman explained to him, and in consequence of which he (G) inserted Proudfoot's name in his books, but seemingly then leaving out McIntyre's. That the 2000 barrels for 1st of May were delivered, and 1000 on account of the 2000 for the 1st of June, and that the third lot of 1000 barrels was paid for on the 28th of May.

That Coleman and Proudfoot both made payments. That the letter of the 25th of May was received from the defendants; and that Cluxton (therein mentioned) was the person from whom he supposed defendants had bought. That Proudfoot called often about the last 1000 barrels, and complained of the delay in the delivery. That the defendants' letter of the 7th (quære, 6th) June was received by the witness G. on the 8th or 9th, transmitting the order of Cluxton upon Hackett of Port Hope in favor of defendants for 1000 barrels. That he called upon Proudfoot with the letter, who said he was not sure the parties at Oswego to whom he had sold would then take it, being nine days late; and he claimed damage, or demurrage, to which the witness objected; but it afterwards appeared that it was for the delay of the vessel that had taken a cargo of the former flour. That on Thursday morning, the 12th June, McIntyre paid the price of the last 1000 barrels to the witness, and he sent it to the defendants the same day. That he saw Cluxton's order before such payment, and there being no acceptance of Hackett, the warehouseman, upon it, nor anything to shew that he held such flour, McIntyre at first objected on that account, but that on the witness assuring him that the defendants were responsible people, he paid the money. On cross-examination, he said (among other things) that the entry in his book had no signature of the parties. That he knew there was a firm of Coleman & McIntyre, and might have supposed he was selling to them until Coleman told him it was a transaction apart from the firm, and that Proudfoot was concerned

with him, but witness did not communicate Proudfoot's name to the defendants. That witness then imagined McIntyre had nothing to do with it, and derived that impression from the conversation of some of them, but could not say he had no interest. That Coleman came in the first instance to buy the flour, and he could not say that he was aware before, and when he signed the bought and sold notes, whether Proudfoot was concerned or not, but made the alteration in his books the same day when Coleman came to get the bought note, and knew of Proudfoot's interest on the day of the sale. That he received the delivery order, on a Saturday morning (9th June), and informed Proudfoot, who on the same day went to the bank to make arrangements for the money if it did not come from Hamilton, and that witness received the money on a Tuesday morning (12th June). That he held the order till he got the money from McIntyre, and then gave him the order. That defendants made no difficulty about Proudfoot's name, when communicated to them, and he was always treated by witness as a principal.

The affidavit of Robert S. Perry of Oswego was read as evidence by consent, to the effect, that on the 12th June, he, at Oswego, received a telegraphic message from the plaintiffs from Toronto, to charter a vessel to go to Port Hope for the fourth lot of the 4000 barrels flour, and engaged the Minerva the same day, which vessel left Oswego for that purpose on the 13th or 14th June. It was admitted that on the 15th June Proudfoot presented Cluxton's order to Hackett, and demanded the flour; and that Hackett said he could only deliver 28 barrels, as the rest had been burnt up the day before.

A witness, Ebenezer Perry, said the Minerva arrived at Cobourg about 12 o'clock on the 14th, the day of the fire, when Hackett's warehouse at Port Hope was burnt. A notice was then put in from plaintiff's to defendants on the 16th June, that they had failed to get the flour. A witness, D. M. Irving, was then called to prove deficiencies in the weight of 500 barrels of the flour that had been delivered, averaging seven and a-half pounds a-barrel, and for which \$97 was deducted by the plaintiff's vendees.

The plaintiffs thus claimed:—

Cash paid 12th June.....	£2125	0	0
Interest.....	61	1	9
	<hr/>		
	2186	1	0
Deficient in weight.....	24	0	0
	<hr/>		
	2210	1	9

They claimed damages according to the market price, proved to be £2 8s. 9d. per barrel 1st June, 1855.

If delivered 1st June at £2 10s. per barrel.....	£2500	0	0
	62	10	0
	<hr/>		
“ “ £2 8s. 9d.	2437	10	9
Deficiency.....	24	0	0
	<hr/>		
	2461	10	0

On the defence a nonsuit was moved on account of the parties plaintiffs—the bought and sold notes mentioning only the names of Coleman and McIntyre, and the book Coleman and Proudfoot, and leave to move in *banc.*; and this point was reserved.

The learned Chief Justice, preferring that the law of the case should remain for the consideration of the court of Common Pleas, he then noted some of the arguments *pro* and *con*, such as the defendants contending that the plaintiffs having been content to receive the flour, though late, it was as if delivered on the 1st June, and that the loss was the plaintiffs', not the defendants'. That plaintiffs contended the loss was not theirs, because they paid the money on the unaccepted order which the defendants had sent them, and that the defendants had not shewn (so far) that the 1000 barrels of flour, or any, was actually stored with Hackett, and had been acknowledged by him to be held for the plaintiffs. The clear meaning of "free on board" was also questioned,—did it mean nothing more than that the vendors were to bear the shipping and warehouse charges, or that they were to ship it? The learned Chief Justice noted that on all the evidence he would ask the jury to say to whom defendants agreed to sell, whether to the three plaintiffs or not. That the defendants urged on the jury delay in sending for the flour from the 12th to the 14th. That defendants could not have received the flour, because, in the event of loss, they could not shew an insurable interest: that is, that

any of Cluxton's flour upon his order was in Hackett's storehouse, and held by him for them. That no place of delivery being specified in the bought and sold notes, the Minerva would have reached Port Hope in time to have shipped the flour before the fire, had she sailed direct to that port instead of to Cobourg; but the Chief Justice considered it not certain, and that no inference of delay would seem to arise from the mere time that had elapsed.

The defendants called, first, Wm. Cluxton, who stated that he lived at Peterboro', and gave the order in evidence. That the 1000 barrels of flour mentioned in it were in store at Port Hope at Hackett's warehouse, a public warehouse; and that Hackett was also a wharfinger and agent for the Harbor Company. That the 1000 barrels flour were there all except 128 which had left Peterboro' on the 6th June, and completed the 1000 barrels, and should have arrived at Port Hope on the same day. That he thought he sent the order by a private hand from Peterboro', Mr. Halton, and that it might have been received by the defendants the same day, but he would not say it was. That he was himself at Port Hope on the 12th June; was in Hackett's warehouse there, and saw the flour there piled up; that 1000 barrels was kept apart from some of his (witness's) which came in afterwards. That the 128 barrels had then arrived and was in the store. That he was not aware any of the flour was short weight; had sent away much of the Otonabee Mills and Peterboro' Mills flour before, and never heard of any being short weight before. On cross-examination he said he was a merchant, and bought wheat and flour; that he did not count the number of barrels; that he went on sending to the 12th June, and after, but after the fire sent to another place; that his last shipment to defendants (quære, from Peterboro') was on the morning of the 6th June; that between the 6th June and (quære, 11th) he thought he had sent some flour (of his own) by another trip of the boat; he believed the only trip after was on the 11th. That he saw in the store on the 11th other people's flour—Hackett's and others—perhaps about 1000 barrels. That defendants had never said they would

look to witness if they failed in this action, nor had he said that they had. That Hackett was then at Port Hope, and was said to have been subpoenaed on both sides.

Second—Bernard Knapp was the second witness: he said he was in Hackett's service on the 6th June and ever since; that on the 6th June there was flour in the storehouse on the wharf for defendants, also on the 11th; could not say how many barrels. That on the 9th June there were in the store 2051 barrels for defendants; that the "Minerva," Shaw master, on the 11th, took away 1015 of those barrels of defendants'; and that she could not take more. That she left on the 11th; that the witness told the captain the remainder of the 1000 was there for him if he could take it. That he knew the 2051 barrels had been sent in by Cluxton for defendants, and told the captain the flour would be ready for him when he came back; that the flour not taken by the "Minerva" was burnt in that warehouse on the 14th at 12 or 1 o'clock; that he was clerk at the wharf or warehouse for Hackett; that everybody's flour was piled by itself; that the "Minerva" came back the day after the fire; that it would take a day and a-half to load 1000 barrels, as it was usually done, and took nearly two days to load the 1015. On cross-examination he said he would have delivered the last 1000 barrels if Hackett told him to do so; that he could not say how much flour was in store on the 11th, in all; has made up the quantity of defendants' flour in store since the fire from his book; that he counted the 1015 delivered, not what remained in the store afterwards; that Hackett had told him to deliver to the captain 1000, and more if he could take it; that he did not know for whom it was shipped, but only that it was defendant's flour, received from Cluxton; that the 2051 barrels had been piled in two piles of the brands of the two mills.

Third—James Ogilvie was called, and said that on the 7th June he was in the defendant's service, and mailed the letter from defendants to Goodenough that day; knew it was important, and was particular, and that the mail closed at Port Hope about 6 o'clock P. M. at that season; that he saw Cluxton's order and read it; and saw it enclosed; that

defendants were receiving flour from Cluxton, but he never counted any.

Cluxton was recalled, and said "free on-board" meant that the charges were to be paid by the seller, not that the seller was to ship it—that he could not; that it means it (the flour) will not be held for charges. Cross-examined, he said there was no responsibility on the vendor as to putting it on board, but only to pay the charges; that he thought the seller would have to take it to the wharf, but not to put it on the vessel.

Fourth—William Lang said, "free on board" meant only that the seller was to pay all charges. Cross-examined: He said he thought the person who paid for putting it on board would employ the person to do it. The fifth, sixth, and seventh witnesses were three millers and packers of the Peterboro' and Otonabee Mills, to rebut the evidence of short weight, and as the jury rejected that part of the plaintiff's claim it is not material to be here stated. A telegraph from Oswego 12th June, signed R. S. Perry, plaintiff's agent, addressed to Hackett, that "the 'Minerva' leaves that day for the flour," seemingly admitted. For the plaintiffs in reply, Mr. Brunskill was called, and said that "free on board" means on board the vessel; that the seller had the contract of the flour for a reasonable time; that the vendor could not draw against it till on board, and the contract would not be executed till the flour was on board; that he thought the plaintiffs were very diligent in having the vessel at Port Hope after getting the order, and thought three or four days a reasonable time. Cross-examined: He said he would insure flour under such circumstances before shipment, if vendee, and would consider that he had a right to transfer it while in the warehouse; that the order not accepted was tantamount to a warehouse receipt; and that payment on such a paper would be on the responsibility of the parties, not of the unaccepted order.

R. J. Whitney of Oswego was called, and said, "free on board" was always understood that the seller was to put on board; and if burnt before shipped in the warehouse, or lost in shipping, the loss he thought was understood to be the seller's.

The learned Chief Justice then asked the jury,

1st.—Whether they were satisfied that the three plaintiffs were in fact the buyers of the flour, which in truth depended on the question whether McIntyre had any interest in it; to which the jury answered, “Yes, the three.”

2nd.—Whether any delay on the part of the plaintiffs in sending to receive it after the 12th June: answered, “No unnecessary delay in sending.”

3rd.—Was part of the last 1000 barrels shipped for the plaintiffs? “They think not.”

And was the remainder in the store when it was burnt? “They think the last 1000 barrels (quæ. were in store).”

As to the alleged deficiency, was there such a deficiency? They found “no deficiency.”

The Chief Justice noted his own inclination of opinion:

1st.—That there was no difficulty about the plaintiffs, who are suing, created by the bought note, provided the jury were satisfied that it was the plaintiffs who did in fact buy—i. e., that the purchase was intended to be for them.

2nd.—That the parties, having accepted and paid for it, though late delivered, delay on defendant's part was immaterial.

3rd.—And that the evidence did not shew delay in sending for the flour.

4th.—That the order not being accepted by Hackett, a delivery (in ordinary cases) must be held not to be completed.

5th.—And if so, then did the payment by plaintiffs, and the receipt of the 15 of the 1000 barrels alter the case—supposing all the flour to have been actually in store, and plaintiffs had then nothing to shew, entitling them to this flour as in store for them.

That he did not see that the payment alone did, and as to the delivery of part, the captain had no authority to bind as to that point. That the contract was to pay on production of warehouse receipts, and none were produced.

That the defendant's counsel wished him to submit to the jury whether Hackett was not, before the fire, holding the flour for the plaintiffs, but the Chief Justice thought that was a legal question, as to whether they were bound by anything that had taken place. He farther notes, that the jury add

they are not satisfied that fifteen barrels of the last 1000 were not so delivered as that they can say the plaintiffs acknowledged getting it. They think undoubtedly the last 1000 had been delivered at the warehouse for defendants, and was there when the fire occurred. They found for plaintiffs \$2186 1s. 9d.; no points reserved. The parties—i.e., plaintiffs—did not assent to raise points, so the Chief Justice said to the jury that upon their finding his own opinion, so far as any legal question was concerned, was, that the plaintiffs were entitled to their verdict, and so it was left to the defendants to move.

Vankoughnet, Q. C., obtained a rule last term, calling upon the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit be entered on the leave reserved, or a new trial be granted on the ground of misdirection, and on affidavits filed.

Hagarty, Q. C., and *Connor, Q. C.*, shewed cause the same term, and after referring to the dates and facts in evidence, contended the defendants should sustain the loss, and that it was a material fact on that point that the warehouseman had not accepted the delivery order. As to the objection to the three plaintiffs being joint parties, that the omission of Proudfoot's name in the bought and sold notes, and of McIntyre's in the broker's book, proceeded from mere inadvertence and the want of full and distinct explanation by Coleman who the intended purchasers were; that the evidence shewed the three to have been jointly concerned and interested, and that it was left to the jury, who found accordingly; that the question, with whom was the contract made, was for the jury; and the counsel likened it to the case of a dormant partner, who might join as a co-plaintiff, though not necessarily,—*Bateman v. Phillips*, 15 East 272; *Garrett v. Handley*, 4 B. & C. 664; *Rage v. Bauer*, 4 B. & Al. 347; *Lucas v. Beale*, 10 C. B. 789; *Duke v. Forbes*, 1 Ex. R. 356; *Jones v. Robinson*, 1 Ex. R. 454; *Cooke v. Seeley*, 2 Ex. R. 746; *Bawden v. Howell*, 8 M. & G. 638.

That laches in getting a vessel was disproved. As to the affidavits, that *Hackett* was subpoenaed and did not attend, and now obtrudes his affidavit, to which no attention should

be paid. That Knapp, who made the only affidavit filed, was examined for defendants at the trial, and ought not now be permitted to fortify his evidence upon points upon which he was or might have been then examined. That the fifteen barrels spoken of formed no part of the 1000 barrels in question, nor was it proved they did to the satisfaction of the jury. That the defendants did not deliver the flour in due time, and so were guilty of laches; whereas had they been punctual, there would have been no such loss as occurred on the 14th of June. That the words "free on board," meant at the defendants' risk till on board. That four questions were left to the jury which included all the facts upon which the case turns, and the jury found them all in the plaintiff's favor. That the defendants were bound to deliver the flour "free on board" the vessel, which was not done. That the order was not a warehouse receipt or equivalent thereto, and the flour continued at defendant's risk until and at the time of the loss, notwithstanding the payment and acceptance of such order. Finally, that the property and risk did not pass from defendants to plaintiffs.

Vankoughnet, Q. C., supported the rule, and urged that the question he had pressed the Chief Justice to submit to the jury was one of fact very material, and one which ought to have been left to them.

That at *Nisi Prius* it was rested by the plaintiff's counsel on the ground that the property did not pass, because Hackett had not accepted the order to deliver in writing in the plaintiff's favor, which was not necessary; and that it is a good ground for a new trial if the question proposed ought to have been put. That "free on board" only related to the charges.—*Howland v. Brown*, 13 U. C. Q. B. R., 199.

That acceptance by plaintiffs was not necessary in the sense in which it would be taken, if necessary to constitute a part or entire delivery and acceptance, to obviate the want of written proof under the Statute of Frauds; and that for the purposes in question there may be delivery without acceptance.—*Johnston v. Odell*, 2 E. & B. 364.

That the plaintiffs' acts were equivalent to acceptance or receipt.—*Bell's Contract of Sales*, 114; *Smith's Mercantile Law*, 5 Edn. 470.

That reasonable time to furnish a vessel was not the test. That the flour was under the plaintiffs' control. That the defendants had no lien thereon, nor would they have had after parting with the delivery order had they not been paid, which affords a good test not to be confounded with a right to stop *in transitu*. That there were no charges against the flour, and so it was delivered free, and ready to be put on board when plaintiffs provided a vessel to receive it. That nothing more remained to be done by the plaintiffs to pass the property, and that there was no doubt of the identity of the flour; referring the Court to the evidence. As to parties, that according to Goodenough's evidence, McIntyre had nothing to do with the purchase, and that the action should have been in the name used by the bought and sold notes, or of those interested in fact, and that either way too many had joined as plaintiffs.—Brown on Actions, 47.

MACAULAY, C. J.—Time has not admitted of my going through the various cases bearing on the question; but the amount is large, and entertaining no doubt upon the rule of law applicable to the facts in evidence, I think it better to express my opinion at once, especially as it results in favor of making the rule absolute and granting a new trial.

The flour had not been actually delivered, nor was it in the plaintiffs' possession at the time of the loss, any further than the right of property and of possession being combined draws the possession in construction of law to the owner; but, assuming the 1000 barrels of flour to have been a specific appropriated 1000 barrels, I think the property therein had passed to, and vested in the plaintiffs, and was at their risk when the loss occurred. Many of the cases will be found cited in 1 U. C. R. C. P. 267, and I have noted many others, of which I would more particularly refer to *Whitehouse v. Frost* (12 East 614, 618), and the antecedent decisions which that case refers or will lead to.—*Holt N. P. C.* 18 and note; *Busk v. Davies* (2 M & S. 397); *Simmons v. Swift* (5 B & C 863); *Tarling v. Baxter* (6 B. & C. 360, 388; *Gow. N. P. C.* 58); *Dixon v. Yates* (5 B. & Adol. 313); *Greaves v. Hopkins* (2 B. & Ald. 131,) much in point; *Swanwick v. Sothern*, (9 A. & E. 895); *Martindale v. Smith*, (1 Q.

B. 889); *Alexander v. Gardner* (1 Bing. N. S. 671); *Wood v. Tassel* (6 Q. B. 284, 8 Ex. R. 814); *Moore v. Campbell* (28 L. J. Ex. 310, 26 Eng. Rep. 523-6.) On the undertaking to deliver F. O. B. "free on board," *Austin v. Craven* (4 Taunt. 644); *Wait v. Baker* (2 Ex. R. 1).

The last case may be considered as in favor of the plaintiffs' argument that the flour remained at the defendants' risk until delivered free on board the plaintiffs' vessel: but it appears to me the obligation so to deliver was not a condition precedent to the passing and vesting of the property in the plaintiffs, but a collateral and superadded undertaking to be performed afterwards: I do not think it depended upon the presentation of the delivery order to the warehouseman and his acceptance thereof, but that the property passed by virtue of the deposit of the flour with the warehouseman, its appropriation to the plaintiffs, their payment of the price, and acceptance of the delivery order. Although no specific property passed by the original broker's contract of sale, I think it did pass when a specific quantity was warehoused, appropriated to, and paid for by, the vendees. In expressing this opinion, I of course infer that a specific 1000 barrels of flour had been so appropriated and paid for. *That* fact seems to have been considered as established at the trial, and forms a material one in a case of this kind. There was express evidence on that point, and the jury were evidently satisfied of the fact, though not seemingly made a distinct question in the various points submitted to the jury. Without therefore considering whether there was sufficient proof of the actual delivery and receipt in fact of fifteen barrels of flour, in part of, and on account of the flour mentioned in the delivery order, which I am not prepared to say there was, it appears to me that if the flour in question was a distinct identified lot of 1000 barrels deposited in Hackett's warehouse, previously owned by defendants, and by them appropriated to the plaintiffs in fulfilment of their contract, the right of property passed to the plaintiffs upon payment by them of the price, and the receipt by them of the delivery order, and that it remained thenceforward at their risk, notwithstanding that term of the contract of sale which bound

the defendants to deliver it F. O. B., or free on board; consequently that the rule should be made absolute for a new trial without costs.

I do not think it depends upon whether Hackett had previously accepted the order or held the flour, prepared to deliver it to the defendants at the time they transferred the delivery order to plaintiffs. There is no evidence of his having been actually apprised of such transfer until after the loss, but in my opinion he had no discretion in the premises; so far as I see, he was bound to deliver it to the owner upon request and payment of his lawful charges, and the plaintiffs had become the owners by the contract of sale, appropriation and payment—if, as I assume, it was Cluxton's flour originally, and had been sold by him to the defendants, and by them to the plaintiffs, without any right to control the delivery by the warehouseman to the plaintiffs under the delivery order. That the defendants owned the flour as vendees of Cluxton was not disputed at the trial.

The affidavits being so strongly objected to, I paid no particular attention to them, especially as my opinion is formed upon the evidence given at the trial irrespective of them; so far as they contain new matter, they operate in the defendant's favor on the fact of identity. As to the misjoinder of parties I thought little of it, deeming it immaterial in my view of the case, and being quite inclined to consider the objection not tenable if it was the only point in the case. I did not consider the defendant's undertaking to deliver free on board prevented the right of property passing to and vesting in the plaintiffs, and with it the risk; and, as to the first or special count that, it having become impossible by an event for which the defendants were not responsible, occurring after the property and risk had passed to the plaintiffs, for the defendants to deliver free on board, or to do anything more than they had done, and that they had done all incumbent upon them, they were excused or exonerated by reason of the destruction and loss of the flour from afterwards delivering it free on board—a thing that had become impossible by reason of an accident for which they were not answerable.

Of course I also thought the payment for, and acceptance

of the delivery order for the flour after the day appointed for its delivery—viz., 1st of June—constituted a waiver of the time, and protected the plaintiffs from recurring to the defendants' failure in that respect after the loss had happened. The question is, at whose risk was the flour on the 14th June, before and at the time it was consumed by the fire? For the purpose of that question it should be regarded just the same as if the flour had been delivered on the 1st of June instead of the 6th or 7th, and that the fire had happened on the 8th or 9th of the month instead of the 14th.

MCLEAN, J. and RICHARDS, J. concurred.

Rule absolute.

SUPPLE V. GILMOUR.

Delivery and acceptance.

S. being the owner of a certain raft, measured by the supervisor of cullers, and whose specification thereof Supple then had, sold the same to Gilmour, under an agreement in the words following:—"Sold Allan Gilmour & Co., a raft of timber now at Carouge, containing white and red pine, the quantity about 70,000 feet, to be delivered at Indian Cove booms; price for the whole sevenpence three-farthings per foot, payments one-third cash, sixty and ninety days date. John Supple. A. Gilmour & Co. Quebec, 20th October, 1853."

On the 24th of October the raft was taken in tow by a steam-tug, and as it approached the Indian Cove booms belonging to Gilmour an agent of Gilmour sent a messenger directing the raft to be towed around the long wharf, where he said there would be men and ropes to take charge of it; that it was towed round the long wharf, but there were neither men nor ropes of Gilmour's there to secure it, but the agent of Supple with his (defendant's) ropes tied the raft to the booms of Gilmour. That during the night the agent of Supple being apprehensive that the raft was not properly secured, he represented that fact to the agent of Gilmour, who sent him to the foreman of Gilmour at the booms to have it safely secured. That the foreman and two others of Gilmour's men got ropes, &c., and as they thought securely fastened the timber. That later in the night the raft parted from the boom, and was scattered along the river and much of the timber lost, although a portion was saved by the servants of Gilmour and at his expense.

Held, That at the time of the loss the property was at the risk of Gilmour & Co.

Writ issued 15th March, 1854. Declaration 12th June, 1854.

SPECIAL ASSUMPSIT.—First count states that, to-wit, on the 20th October 1853, in consideration that plaintiff, at defendant's request, would sell and deliver to him a raft of timber then at Carouge, containing white pine, about 71,000 feet, and deliver it at Indian Cove booms, at the rate or price of 7½d. per foot, amounting to £2,307 1s. 7d., he, defendant, promised plaintiff to pay him therefor at that rate as follows:

one-third cash, one-third at sixty days, and one-third at ninety days from the delivery thereof, whenever after such delivery requested. That plaintiff did afterwards *sell and deliver* the said quantity of goods at the place and on the terms aforesaid; yet plaintiff saith that defendant did not, though requested, pay plaintiff the said price of said goods, or any part thereof, &c.

Second count.—£5000 for goods sold and delivered.

Third count.—£5000 account stated.

Fourth count.—£5000 interest.

Pleas, 20th June, 1854 :

First—Non assumpsit.

Second, to first count.—That plaintiff did not deliver the said quantity of goods in said first count mentioned, or any part thereof to defendant, pursuant to said contract, as alleged, &c.; on which pleas the plaintiff joined issue. The cause was tried before Mr. Justice Richards, at the last Spring assizes, Bytown. It appeared in evidence that in October, 1853, the plaintiff was possessed of and owned a raft of white and red pine timber, principally white, lying in the booms at Carouge, a cove eight miles above Quebec, on the River St. Lawrence. That it was measured off on account of the owner by the supervisor of cullers and his servants, under the P. S. 8 Vic. ch. 49; whose specification was dated the 15th October, 1853, and represented in quantity, stating each piece in detail, to be 1,077 pieces of white pine, containing 67,539, 4, 5; and 104 pieces of red pine, containing 3,906, 3, 7=71,445, 8. That defendant was one of the firm of Gilmour & Co., lumber merchants, possessed of and owning booms above Quebec, at a place called Indian Cove, on the River St. Lawrence; such booms being intended to secure timber delivered or placed therein. That the specification was placed in the hands of one of the defendant's firm to examine or consider, and that on the 20th October, 1853, an agreement was entered into in the following terms: "Sold Allan Gilmour & Co. a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet to be delivered at Indian Cove booms; price for the whole 7½d. per foot, payments one-third cash, sixty and ninety days; date Quebec, 20th October, 1853. Signed John

Supple. A. Gilmour & Co.:" explained to be in the handwriting of David Gilmour, one of the firm of and for Allan Gilmour & Co., and the body of it seems of the same handwriting.

It appeared in evidence, that on Monday the 24th October 1853, the raft was towed by a steam tug from Carouge to Indian Cove; that the tide began to ebb that day between 11 and 12 o'clock, and the raft left the Carouge booms between 12 and 1, and arrived at Indian Cove between 4 and 5 o'clock P. M., being about the middle of the ebb-tide at that place; that one person only accompanied the raft on the plaintiff's behalf,—viz, his clerk—except, of course, those on board of the steam tug. There was no proof that previous notice of the plaintiff's intention to deliver the raft on that day had been given to the defendants, or at their boom, nor at what particular part of the boom the steam tug, or persons in charge of the raft, were directed to deliver it. There was evidence that it is usual to give previous notice that the purchaser may be ready to receive. It was proved that the specification upon which the contract of purchase was based had been sent to the defendant's agent at Indian Cove, and that such agent expected the raft to arrive soon, though not upon the day in question; that the defendant had a great number of men in his employment at his boom, whose duty (among other things) it was to receive and take rafts into the booms; that the defendant's resident agent at the booms saw the raft approaching in tow of the steam tug, and observing the tow coming in above the wharf (called the long wharf) sent a messenger to hail the steamer and desire the master to tow the raft round below the wharf, which was done accordingly; that the messenger said there were men and ropes below to secure the raft; that on arriving below the long wharf, there were no men or ropes there, and the plaintiff's agent in charge and a man from the steam tug succeeded in tying the raft to the defendant's boom with ropes of the plaintiff, when the steamer left it and returned to Quebec; that it was at that time between 4 and 5 o'clock P. M., and the middle of the ebb-tide or more, and the weather calm, though getting dark; that the plaintiff's agent

or clerk went ashore, and saw the defendant's agent, to whom he mentioned the arrival of the raft, a fact of which he expressed himself already aware; but the plaintiff's agent did not demand a receipt at that time:—as to the precise terms of their conversation, the agents of the parties respectively differ in their evidence:—that some time, or a few hours afterwards, the plaintiff's agent, apprehending that the raft was not sufficiently secured, represented to the defendant's agent his wishes that it should be more safely moored; that the defendant's agent thereupon sent him to the defendant's foreman at the booms to have it done; that such foreman and a couple of defendant's watchmen or servants got lanterns, it being then dark (and seemingly raining), also ropes and chains, and secured the raft to the boom as they all thought effectually; that so it was left apparently until and after the full flood tide; that late at night, and during the succeeding ebb, the wind blowing from the west, the raft parted from the boom and was scattered along the river below, and much of it lost, although by the exertions, and at the expense of defendant's people, a good deal was secured. There was much evidence on both sides, mainly with a view to the question of delivery and acceptance, and it was very conflicting, both as to the usages of different boom owners in receiving, examining, and taking in rafts, the necessity or propriety of notice, the proper or reasonable time of the tide for delivering, the best practicable period for opening the boom and letting in rafts, also the hour of the day and state of the tide and weather when this raft arrived, the expediency or possibility of examining, checking or booming it at once or at the next flood tide, the diligence and vigilance of both the plaintiff's men and the defendant's employees as well as the duties incumbent upon them respectively, the facts as to offer or tender of delivery on the one hand and of acceptance on the other, for there was no express declaration of delivery nor any express acceptance, or express refusal to receive,—all of which evidence in detail should, perhaps, be incorporated in a full statement of the case. The decision will, however, be

found to turn upon the leading facts, and to rest upon the points about which there is little discrepancy in the evidence.

It may be taken as established facts, that the raft of timber contained in all 71,445 feet by the culler's specification ; that although this measurement was *ex parte*, it was not intended to be remeasured, the usual course being, to examine, compare and check the cribs or pieces with the specification as with invoices of goods—See 8 Vic. ch. 49, sec. 12 ; that the plaintiff was to deliver it at the defendant's boom at Indian Cove ; that the specification was delivered by the plaintiff to one of the defendant's partners, and forwarded to Indian Cove before the arrival of the raft ; that the raft was towed down at the usual or best time of the tide for that purpose, the weather being favorable ; that it is not customary if practicable, to boom a raft (descending as it must with an ebb-tide) until the tide re-flows, full water being the best period for doing it ; that in the mean time, between the arrival and taking into the boom, the raft is secured to the boom outside, where it may be examined by the specification ; and that it should be boomed when the tide comes, whether by day or night.

That, at the end of October, in the latitude of Quebec, the days are short, and the weather variable and uncertain, that the plaintiff sent only one man with the raft, a person who had never delivered a raft before ; that it reached its destination safely in tow of the steamer ; that the steam tug's duty was done, and it left the raft after execution of the work undertaken by the master of the tug ; that the defendant had numbers of boomsmen and others in his employment at his booms, whose business it was to receive and take in rafts ; that the defendant's resident agent and others saw the raft coming with the ebb-tide in the afternoon, late in the day, but before dark ; that, seeing it setting or swinging in above the long wharf, the defendant's agent sent directions for its being towed round to the boom below the long wharf, which was done ; that though seen, and so directed as to the point of destination, no steps were taken by defendant's people to take charge of or to secure it, but the plaintiff's man and the men of the steam tug were left to themselves ;

that with the knowledge and direction of defendant's agent, the raft was taken to the boom below and fastened thereto by those who brought it, after which the steam tug left it; that the defendant's agent knew it was tied to the boom; that, owing to representations of the plaintiff's foreman or agent, the defendant's foreman and others were sent by the defendant's agent after dark to secure it better; that in the state of the tide upon its arrival, it could not have been boomed immediately—at all events, not without inconvenience and risk to other timber within the boom already; that the defendant's foreman deemed it safely secured for the night; that no attempts were made to examine it that night, nor any efforts to boom it when the tide returned; that it broke loose during the ensuing ebb, without apparently any efforts on the part of any one to prevent it.

There was much evidence as to what the plaintiff's agent and the defendant's agent said, and their conduct in relation to the raft the night of its arrival and up to the time of its loss, especially the fact of the plaintiff's agent remaining at the office near the raft for the night; instead of going to a tavern to sleep; how far he was led to do that by reason of what the defendant's foreman had said to him might be a question, but it is probable that neither party thought anything on the subject of delivery as respected the risk in case of loss, no loss being apprehended. There is no reason to suppose the plaintiff's agent (inexperienced as he was) did not act throughout in perfect good faith; and it is probable he considered it his duty to obtain a receipt for the raft, and remained for that purpose. He may have thought he could not demand it on his arrival, owing to the lateness of the hour, and the want of time to compare the raft and specification &c. The question is, at whose risk was the raft lying where it was when it escaped; that depends upon whether the plaintiff had delivered it at Indian Cove boom (of course to the defendant), according to the terms of the sale. The plaintiff contended he had done all incumbent upon him when the steam tug left it at, and fastened to the boom with the knowledge and assent of defendant's agent. The defendant contended he was entitled to a reasonable time to

examine, or, if he pleased, to measure the timber, and was not bound by the specification as to quantity; and that the hour of arrival did not afford a reasonable opportunity either to examine the raft, or to take responsible charge of it.

One test seems to have been *quo animo* the defendant's men further secured the raft that night, whether to befriend the plaintiff merely, or to serve the defendant. It was probably done without any formed object either way—the agents of both supposing the raft safe, and expecting it to remain outside till next day, or at all events till the next tide served to take it in. The case of *Logan v. Lemessurier*, 11 Jur. 1091, 6 Moore, P. C. 118, is relied upon by the defendants.

The P. S. 8 Vic. ch. 49, secs. 23, 24, 25, was referred to, touching the force and effect of the specification, and secs. 5, 6, 8, 9, (No. 1) secs. 12 and 13; *Simmons v. Swift*, 5 B. & C. 847; *Dixon v. Yates*, 5 B. & Ad. 313; *Proviso*, sec. 14 Nos. 3 & 4; also white and red pine at Ps. 304, 305, in the printed statute, sec. 17.

The rule or test is, whether anything further remains to be done by the vendor to identify the property, and render it ready for delivery on his part,—*Zagury v. Furnell*, 2 Camp. 240; *Hanson v. Meyer*, 6 East 614; *Hinde v. Whitehouse*, 7 East. 558.

Hagarty, Q. C., for plaintiff.

Cameron, Q. C., and *H. Cameron* for defendant.

MACAULAY, C. J.—The present case differs from *Logan v. Lemessurier* in these important particulars, that there the timber, if rafted, was at a great distance, and had not, like the plaintiff's reached the market, nor could it do so until several months after the contract, and when it arrived was to be paid for on delivery, measured off—that is, measured off in the raft—and chained under the control of the sellers. The property was Donald's, who stated the quantity to be 1791 pieces, measuring 50,000 feet, more or less; whereas in the present case the plaintiff owned, and was possessed of, the raft, which had reached the market, was securely moored, and had been measured off before the sale, and no such words are contained in the written note of such sale.

In *Logan v. Lemessurier* Lord Brougham is reported to have said, in delivering the judgment of the court, that it was not an agreement to sell, but a contract of sale upon certain terms. The words were, "*Logan & Co. sell, and Lemessurier & Co. buy, a quantity of red pine timber &c.*" Here the words are, "*Sold Gilmour & Co, a raft of timber now at Carouge &c., to be delivered at Indian Cove booms &c.*"

His Lordship said, "that to constitute a sale, which shall immediately pass the property, it is necessary that the thing sold should be ascertained in the first instance, and that there should be a price ascertained or ascertainable; but the parties may buy and sell a given thing, nothing remaining to be done for ascertaining it but the price to be afterwards ascertained in a manner fixed by the contract of sale, or upon *quantum valebat*; or they may agree that the sale shall be complete, and the property pass in the specific thing, chattel or other, although the delivery of possession is postponed, and although something shall remain to be done by the seller before delivery; or they may agree that nothing remaining to be done for ascertaining the thing sold, yet that the sale shall not be complete, and the property shall not pass before something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in that respect; and that is of course to be collected from the terms of the contract; if those terms do not shew an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done."

Again—"taking the whole of the terms (in that case) together, it appears to us that until the measurement and delivery was made the sale was not complete, there being nothing in the terms to shew an intention that the property should pass before the measurement, but rather the contrary, &c."

Again—"It was to be delivered at Farline's boom, Quebec," to be paid at $9\frac{1}{2}d.$ a-foot, measured off—that is, "when measured off;" and as the seller was to carry and deliver it at Quebec, he is the party to measure it there."

Now, here the seller had measured it off before the sale, and nothing more remained to be done on his part except to deliver it at Indian Cove booms.

It was therefore the sale of specific goods in the bulk, or in the mass, identified by reference to the raft, and the only uncertainty of expression in the sale note is the use of the word *about*. The case of *Moore v. Campbell* (28 Ex. R. L. J. N. S. 310) bears upon this point, and the language of *Park B.* is apposite—See also *Covas v. Bingham* (2 E. & B. 886.)

It was contended the specification was not admissible in evidence; I think it was. Its existence as a fact might be proved, also its due taking, also its delivery into the hands of one of the defendant's partners, and its subsequent transmission by him to Indian Cove after the contract. Being the basis of the plaintiff's overtures to sell and of the defendant's contract to buy, it shows the quantity and obviates all further doubt respecting the word "*about*," and in reference to the statute it explains what was meant where it was said the purchaser only compared it with the timber as of goods with the invoice, without measurement, for the timber was, or should be, marked to correspond with the specification. The contract does not refer to the specification, but both it and the specification refer to the raft or the timber in bulk; and as a part of the *res gestæ*, as it were, I think it admissible evidence.

It may be material also upon the question of intention. Then tried by Lord Brougham's rules, here it is, not an agreement to sell, *but a sale*—"sold," which imports an actual sale as distinguished from a mere agreement to sell. *Wilks v. Smith* (10 M. & W. 260); *Playfair v. Musgrove* (14 M. & W. 244-5-7).

Sold a specific raft of timber, in bulk, about 71,000 feet, to be delivered at Indian Cove booms, price for the whole 7½d., one-third cash, sixty and ninety days date. It may be said price for the whole refers to about 71,000 feet, and that it was impossible to determine what sum was to be paid until measured or rendered certain at the delivery.

But Lord Brougham says it is necessary there should be a price ascertainable; here it was ascertainable by a past, not a future measurement; and this seems to distinguish it from these

cases in which something remains to be done by the vendor to ascertain the amount of an agreed ratable price; such as, weighing, measuring, counting, &c.: it has been held the property—that is, the right of property—did not pass from the vendor to and vest in the vendee; and that his lordship was contemplating cases circumstanced like the present, is, I think, shewn by his language as he proceeds. Governed by intention then, as elicited from the terms of the agreement, construed with reference to the state of facts attending the transaction at the time the contract was made, so far as the same may be legally shewn in evidence, what was the intention? was it an absolute sale, or only an agreement by plaintiff to sell at a future period of time at Indian Cove? No time being fixed for the delivery, a reasonable time would be intended.

The place of delivery was Indian Cove, the place of sale and purchase was Carouge, the payment to be made upon delivery, and nothing remained to be done by the vendor but to deliver, to entitle him to the price. Then, is it a rule that if the vendors owning a specific chattel at a specific place sell it, and agree to deliver it at another place, the right of property, as well as of possession, remains in them until delivery, as if the delivery afterwards was to constitute both the sale and delivery, or as if the sale was inchoate as a sale, until delivery, or a conditional sale; a sale of specific goods upon conditions that the vendor delivered the goods at the specified place.—*Acraman v. Morrice* (8 C. B. 449), *Startup v. Macdonald* (6 M. & G. 593).

If the right of property may pass to and vest in the vendee at one place, while the risk remains with the vendor until delivery at another place, I should think the right of property passed in this case by force of the contract of sale, and I am not satisfied that both the property and risk did not pass, subject to the possession remaining with the vendor to perform the undertaking to deliver it at Indian Cove, and to exercise his right of lien thereon till paid therefor; but it is too doubtful a matter under the authorities referred to; and I prefer, therefore, regarding it as if both the property and risk continued with the vendor until the raft was by him

delivered at Indian Cove, in full performance of the contract of sale on the plaintiff's part. Assuming then that the property remained the plaintiff's, and at his risk until delivered, was it delivered according to the intent and meaning of the sale? This is to be determined by the facts and circumstances; so far as it rested with the jury it has been decided in the plaintiff's favor, and the principal question now is, whether there was sufficient evidence to go to the jury in support of that conclusion.

The subject of delivery was elaborately discussed in *Startup v. Macdonald* (2 M. & G. 395; S. C. 6 M. & G. 593), *Isherwood v. Whitmore* (10 M. & W. 757; S. C. 11 M. & W. 347). Other cases turned upon the sufficiency of the acts done to constitute an acceptance absolutely or within the Statute of Frauds.—*Playfair v. Musgrove* (14 M. & W. 237), *Marten v. Tibbett* (15 Q. B. 428), *Meredith v. Meigh et al.* (Q. B., T. T. May, 1853), *Hunt v. Hecht* (8 Ex. R. 814), *Holmes v. Hoskins* (9 Ex. R. 753; S. C. 28 Eng. R. 564), *Acraman v. Morrice* (8 C. B. 449), *Rigney v. Mitchell* (2 U. C. C. P. R. 276-7).

They shew that as a general rule delivery and acceptance are often concurrent dependant acts; so that though there may be a tender of delivery, there could not be actual delivery without acceptance. In *Hunt v. Hecht* (22 L. J. Ex. 293), Alderson Baron is reported to have said, there was there a delivery, but no acceptance.—S. C. 8 Ex. R. 814; *Dixon v. Yates* (5 B. & Ad. 340), *Tansley v. Turner* (2 Bing. N. S. 151), *Alexander v. Gardner* (1 Bing. N. S. 671-6), *Rhode v. Thwaites*, (6 B. & C. 392), *Tarling v. Baxter* (6 B. & C. 360); see 1 Story's Reports, 38), *Smith v. Chance* (2 B. & Al. 755, per *Holroyd, J.*)

Then, had the defendant here any right to reject the raft if it was in fact the timber contracted for? Certainly not, if the raft taken to Indian Cove was the same sold as lying at Carouge. Then being bound to deliver, did the plaintiff deliver? That he did in fact deliver it, or place it at the Indian Cove booms, being the place at which by the terms of sale it was to be delivered, seems clear: whether he had parted with his lien for the price or not would depend upon whether

the delivery was complete, including acceptance; although it is consistent with the right of lien that the property had vested in the vendees and was at their risk.

The evidence of delivery and acceptance is the sale—transmission of the specification—the knowledge of the arrival of the raft—the directing the plaintiff's agent where to take it, in other words, where to deliver it—a compliance with such directions, and notice thereof to the defendant's agent—and its being afterwards better secured by the defendant's men.

Moreover, we have here a large raft towed down the stream by a steamer, with a single man in charge, shewing the plaintiff's expectation that it would be taken charge of by the defendant's men on its reaching the boom; the steamer placed it at the boom in good time to be secured thereto by the defendant's men, but not attending to do so, the plaintiff's man attached it to the boom, and the steamer left; later in the evening the defendant's men fastened it more securely with his own ropes. The defendant had men resident at the Cove, to receive and to take charge of rafts. Then, as to the reasonableness of the hour, it was with the jury. It was late in the year, days short, and the risk increased, if suffered unduly to remain outside. That it might have been effectually secured seems clear, but it was neglected. The defendant's agent did not refuse the raft, and the plaintiff's man could do no more towards delivering it. Acceptance is denied, by reason of the right to inspect or measure, the lateness of the hour, the want of notice, &c. But no day or hour was fixed for delivery. The reasonableness of the course taken was for the jury, and it does not seem unreasonable. It could not well be done otherwise without equal, if not more inconvenience. The nature of the business required prompt delivery on reaching the defendant's boom, and prompt acceptance by them; and seeing that the plaintiff sent it short-handed, and without anchors or cables, not only manifested an expectation on his part to be promptly relieved of the charge, but if known, afforded in itself intimation to the defendant's agent that he so regarded it, and that when the steamer left it, it was in his and the master's view delivered at the defendant's boom, and thenceforth at his risk. It

might also be said to evince an intention of waiving any lien for the price, as the plaintiff could not have expected payment at the booms, but at Quebec, after the delivery at the booms. The argument is no doubt strong and forcible either way, but it was for the jury to decide. I think there was evidence sufficient for them to consider whether there had not been both a delivery and acceptance: I mean a delivery and acceptance that shifted the risk and changed the property if not done before, but such acceptance being only of the raft in bulk as it was purchased, and subject to being afterwards examined and checked by the specifications, or measured by defendant if he wished to incur the trouble and expense: it is not a question of acceptance on reference to the Statute of Frauds. In some points of view it may have fallen short of that; while in others, though it amounted to such acceptance, it was consistent therewith that the defendants still retained the right to inspect the timber and reject it if not the same that had been bought: the price was fixed, nothing was to be done at the boom to ascertain it; the quantity was 71,000 feet until the contrary was shewn. If the specification was looked to as a guide, it rather exceeded it. If defendant had chosen to measure it, and the quantity was less, the quantity to be paid for would be less in proportion. The plaintiff had no more to do; he was not bound to measure it; he took it to the place agreed upon; the defendant had notice thereof, but did not send men to receive it, though numbers of his servants were at hand; and considering the season of the year and the state of the weather, it was reasonable for the plaintiff to have expected that instead of the apathy manifested by the defendant's servants, a prompt and vigilant attention would have been bestowed upon a property of such large value, exposed as it was necessarily for a time outside the boom. The defendant's foreman supposed he had effectually secured it, and it was perhaps owing to a too confident reliance upon its safety that more vigilance was not exercised. It was deemed safe at whosever risk. According to the terms and spirit of the agreement the plaintiff's risk should cease upon his delivery, or taking the raft to and placing it at the booms; and when the defendant's men and tackle secured it

thereto it ought to be considered, *quoad* the risk, as having been accepted; at least it was, I think, open to the jury so to find on the evidence. And, upon the whole, however difficult to reconcile my opinion with all the cases, or however doubtful and attended with difficulty the question may be, I think the more reasonable and satisfactory conclusion is, that when lost the raft of timber was at the defendant's risk, as between the vendor and vendee, and consequently that the rule should be discharged. What defendant's men did in securing the stray timber, and the defendant's conduct after the loss, though not conclusive in proof of acceptance, were facts which the plaintiff was entitled to prove, to go to the jury with the other evidence.

The timber in the raft might have been compared with the specification with the aid of lanterns, the same night, before the return of full tide, for all I see to the contrary, however unusual, difficult or unreasonable. It was practicable, if the defendant would not receive the raft within the booms without it, and the occasion at that late season of the year was urgent.

McLEAN, J.—It was proved that the raft was towed from Carouge to the Indian Cove booms of the defendant, without any accident whatever, only one person, a clerk of plaintiff, being on the raft and in charge for him, while being towed from one place to the other. On arriving at Quebec, the master of the steamer was about to put the raft in defendant's boom, above the long wharf, and two persons came out from the wharf on the booms, and told him to take the raft below the long wharf. It was in consequence taken lower down to the place desired, and there it was fastened to the defendant's boom—ropes and assistance being given by defendant's men in securing it. By the testimony of the master of the steamer, and also by the evidence of McCrae, plaintiff's clerk, it appeared that the raft arrived at the booms some time before dark, and that the defendant's agent and servants had notice of its arrival. No formal delivery was made, but McCrae swears distinctly that Mr. White, defendant's clerk, said, when informed of its arrival, that he would send men to

take charge of it, and he also states that instructions were given to one Welsh, a foreman of defendant's, to that effect, but that he informed Mr. White he could not get the men to turn out for the purpose, as it was raining, and that the raft would be taken into the boom when it cleared up during the night. There is a good deal of evidence on the part of the defendant to show that McCrae did not make any delivery of the raft, and that he remained near it during the night, for the purpose of looking after it. There is, however, no dispute or doubt as to the fact that the raft was brought to the Indian Cove booms by the plaintiff, and there fastened to the booms of defendant, some time before dark, and that defendant's clerk and servants *received* notice, and were aware of its being there, and took additional fastenings to the raft, and endeavored to make it secure. It is alleged that this was all done by McCrae as plaintiff's agent, and that he, and not the defendant's men, had the charge of the raft. If there was in fact no delivery according to the terms of the contract, then plaintiff could not recover; but if he did all that was incumbent upon him to do to constitute a delivery, then the contract was completed and the loss of the timber should fall on the defendants. During the night, while the raft was lying at the defendant's boom, it broke loose in a storm, and was carried away, and a great portion of the timber lost. What was saved was saved by persons employed by defendant, and at his expense. A nonsuit was moved for on the ground that there was no sufficient evidence of delivery to entitle the plaintiff to recover. But the learned judge held, and I think correctly, that there was abundant evidence to go to the jury on that head. After hearing all the evidence, the jury rendered a verdict for the plaintiff, for the value of the timber. A new trial was moved for, and cause shown during the last term, and it was contended on the part of the defendant that even had the timber been placed in the booms of defendant, it would still remain at the risk of the plaintiffs till the precise contents of the raft were ascertained by actual measurement on the part of defendant; that the contract being to purchase the timber at a certain price per foot, it would not be complete till the number of feet were ascertained, and that the plaintiff

could have stopped the timber *in transitu* between Carouge and Quebec, and after its arrival at Quebec, at any time before a formal delivery of it was made to defendant. On the other hand, it was contended by Mr. Hagarty that the timber actually passed to the defendant by the terms of the contract while at Carouge, though the plaintiff could not claim payment for it till he delivered it at Indian Cove boom; that by the contract, plaintiff sold and the defendant bought the whole raft, at a certain rate per foot, and that measurement was not necessary to the completion of the contract, that it might be for the purpose of ascertaining what might be payable as the price of the timber purchased.

It appears to me the case went fairly to the jury, and that there was ample testimony to support the verdict which they rendered.

The terms of the contract could not be varied by anything done by McCrae, plaintiff's clerk, after getting to Indian Cove booms. He could not there assume any responsibility or risk on the part of the plaintiff—nor could the defendant shift the risk from himself by leaving the timber outside the booms during the night after its arrival. All that the plaintiff had to do under the terms of his contract was to deliver the timber at Indian Cove booms: that was done, and the defendant was notified that the timber was there. The plaintiff had nothing to do with putting it into the booms—that wholly depended upon the defendant and his servants. He had a right to choose his own time: if he chose to leave it outside, or neglected to take it in, the plaintiff could not be made subject to the risk arising from his choice or neglect. The contract, as it appears to me, was completed on the part of the plaintiff by the bringing of the timber to Indian Cove booms, without any formal acceptance there by the defendant. But there was evidence that the defendant's clerk had notice of its arrival, and promised to send men to take charge of it, and that they did so far take charge of it (though they say it was for the plaintiff) as to secure it by additional fastenings to the boom. If the timber had been brought down from Carouge by a steamer, without the presence of any one on the part of plaintiff, and it had been brought to the boom

and there fastened, and notice given to the defendant, it could scarcely be said that the risk must be borne by the plaintiff, till the state of the weather or the convenience of the defendant admitted of its being placed in security. The plaintiff was not bound to know anything as to defendant's desire to have the raft taken *within* the boom: nor was he bound to consult the defendant's convenience as to the time of arrival at the booms. If it was intended by defendant that it should only be received when the state of the tide or of the weather was such as to admit of the booms being opened with perfect safety, the contract should so have expressed it; but, in the absence of any such stipulation, I think the plaintiff did all that was incumbent on him, and that he is entitled to recover the value of his timber.

RICHARDS, J.—In this case there was evidence to go to the jury of an actual acceptance by the defendant's servants of the raft, after its arrival outside the booms at Indian Cove, the place of delivery agreed upon; and the jury having found against the defendant on the evidence, I do not see any sufficient grounds for the Court now interfering.

Although the jury took the view of the case contended for by, and most favorable to the plaintiff, I am by no means prepared to say that under the undisputed facts of the case the loss of the timber ought not to be borne by the defendant and his partners.

On the 20th October, 1853, the raft then lying at Carouge Cove, and having been measured, was sold to defendant's partners in Quebec, the specification of the measurement being at the time produced, showing 71,443 feet, and the memorandum of sale stating the raft to contain about 71,000 feet, which was to be delivered at Indian Cove, at the booms.

At a proper time in the day and of the tide, on the 24th October, the plaintiff put the raft in tow of a steamboat, and they arrived at the Indian Cove booms between four and five o'clock in the afternoon, and by direction of Gilmour & Co.'s servants the raft was placed on the east side of the long wharf, and temporarily secured there. Afterwards, the raft was made more secure by chains, &c. Towards morning a

storm arose, when the raft broke loose, and a large quantity of the timber was lost. It is contended by the plaintiff that the timber was secured by Gilmour & Co.'s servants, with a view of accepting it under the contract, of which they had been made aware; whilst the defendant contends that it was not delivered at a reasonable time in the evening, to enable the purchasers to measure or compare it with the specification, and that they could not be required to receive it until such time had elapsed; that they did not in fact receive it, and only assisted to secure it for the benefit of plaintiff.

As a general principle, I apprehend that whenever goods are sold and paid for, the property in the goods passes to the purchaser, so that he may, if the vendor refuse to give them up, maintain trover for them, and would have to bear the loss if he permitted them to remain in the hands of the vendor, and they had been then accidentally destroyed.

As to agreements to be completed *in futuro*, the rule is, that if nothing remains to be done on the part of the seller as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller. But if any act remains to be done on the part of the seller, then the property does not pass until that act has been done.

Now in the case before us, I am hardly prepared to say that the property in the raft passed to Gilmour & Co. when it was lying at Carouge booms. The plaintiff had something more to do with it—viz., to take it to Indian Cove booms. Until it was there delivered, his contract was not complete: but when it was so delivered, at a reasonable hour of the day to enable the purchasers to satisfy themselves that it was the same raft they had purchased, and that it was substantially in the same state as when they made the bargain for it, then the plaintiff, having given them the proper notice, would have substantially performed his part of the bargain. Under such a state of facts, if an action for goods sold and delivered would not lie, at least one for goods bargained and sold would. If the latter action would lie, the Court would not grant a new trial merely to allow the plaintiff to recover on an amended declaration.

I am of opinion that the evidence is strong enough to show a sufficient delivery on the part of the plaintiff, of the raft, at the Indian Cove booms, to pass the property in it to the defendant and his partners.

We must look at the position of affairs at the time the contract was made. The raft was at Carouge, was to be delivered at Indian Cove booms, situate about nine miles further down the stream. It could only be taken down during fair weather and at a time when the tide was running out, and was to be delivered *at* (not inside) the booms, and at a season of the year when the weather was likely to be very uncertain. It had been measured, and the specifications were in the hands of the purchasers. It is not suggested that there was any unnecessary delay on the part of the plaintiff in removing the raft from Carouge, or that it was removed at an improper hour of the day. But it is contended that it arrived at the Indian Cove booms at a time of the tide when it could not be taken inside, and at a time of the day when the timber could not be measured. It was, however, stated by Messrs. Gilmour & Co.'s foreman, and by several other witnesses, that it was usual to take rafts into the booms whenever the state of the tide permitted, whether they were measured or not, and that in comparing the rafts with the specifications they generally went over the number of pieces or averaged them, and received the raft if everything appeared right. It also appeared that this could have been done with the raft in question in about an hour's time.

The captain of the steamer by whom the raft was towed, down stated that it was about half-past four o'clock when he left the raft made fast at the booms, and that it was dark about six o'clock. It further appeared that it would take about two hours for the raft to come from Carouge to the Indian Cove, and that it left Carouge at the latest about two o'clock P. M.; that it could only be taken out of the booms there at full tide, and could not be received into the Indian Cove booms until the next tide came in, although it could be and was attached to the outside of those booms at about half tide. It is true the defendant's witnesses seem to consider that the raft arrived at Indian Cove as late as five o'clock or after that, but I think the probabilities are greater

that it arrived, as stated by the captain of the steamer, about half-past four o'clock, and if so, in sufficient time to enable defendant's servants at the boom to satisfy themselves before dark that the raft was in the same state as when sold, although it could not have been minutely measured. Their statements went to show, and I think did so conclusively, that the raft had not arrived in time to be put into the booms before dark that evening, and that it was not proper or safe to open the booms when the tide was running out. This can, however, make no difference as to the right of the plaintiff to recover. The defendant's agents had notice of the arrival of the raft, and in fact directed where it should be put in and made fast on, below the long wharf, and had this notice, as I consider, in time to have examined it. It seems to me, the plaintiff having so placed the raft at defendant's booms, performed all he had to do; what remained to be done by him in the performance of his contract had been done, and the property in the timber passed to the defendant and his partners.

All the evidence goes to show that the raft was not detained outside of the booms to enable the defendant's servants to measure or compare it with the specifications, but was so detained because the state of the tide and weather would not permit of its being taken in. There was not anything said to plaintiff's agent that the raft could not be received that night because he had arrived there so late that the contents of it could not be ascertained, and that it would be detained outside until morning, to enable them to ascertain its contents: on the contrary, Welch, the defendant's foreman, said he intended to have taken it in at the time of the tide. So in truth the suggestion as to verifying the specifications or ascertaining the contents of the raft would have the effect of keeping it outside the boom at the risk of the seller for several hours, until the purchaser found the state of the tide and weather such as would enable him to take it in without risk. In cases like the present, when the sale is made late in the fall, and the state of the tide will only permit of a delivery at a late hour in the afternoon, the imposing of such a risk is a serious matter, and I do not see that such was the intention of the parties in making this contract. When the raft was

placed beside the boom at a reasonable hour, plaintiff could do no more; he had in fact done all he undertook to do, and the property became vested in the purchasers, who must bear the loss. On the whole, it appears to me quite plain, from all the evidence, that the reason why the purchaser did not take the raft inside of his booms, and fully and formally beyond all dispute into his possession, was, not that he had not reasonable time to satisfy himself that it was in the same condition as when he bought it, but that the state of the tide and of the weather, or perhaps the negligence of his servants, did not permit of his taking it into the booms before it was lost; and that any delay in taking possession (if possession was not actually taken by him,) was not to compare the raft with the specification, but to enable him more conveniently to take it into his booms, and that a loss arising whilst the raft was lying outside the booms, from such a cause, ought not, under the contract between the parties, to be borne by the plaintiff.

As to the two objections taken to my charge at the trial by the defendant's counsel, I suppose it is better for me to state how I put the matters referred to before the jury.

I said that the *grounds* on which the plaintiff contended there had been an acceptance of the raft, were: First, the positive evidence of McCrea to that effect; the securing of the raft to the booms by defendant's servants the evening before its loss; their efforts made to save the timber afterwards; the conversation had with Mr. John Gilmour, wherein he spoke of the losses that boom owners were subject to arising from the negligence of servants, which he (plaintiff) contended had reference to the loss of the timber in question; that there could be no fair pretence for keeping the raft outside of the booms at Indian Cove to measure it or ascertain its contents, as it had been measured at Carouge, and the specifications, which were *prima facie* evidence of its contents, were in the hands of the purchasers. I stated that these, with others which were suggested at the trial, were the grounds on which the plaintiff contended that he was entitled to his verdict.

I then stated that the defendant on the other hand con-

tended that there had not been any delivery or acceptance of the raft; that the evidence of White and Welch, and the other witnesses called by him showed this, and that, under the circumstances proved, it was impossible for him to have accepted; that the securing of the raft was to protect it for the plaintiff, and not for Messrs. Gilmour & Co., and that the saving and putting up of the timber afterwards was for the same purpose; that, whether the raft had been accepted by him or not, he was bound by every moral consideration to save the property, and that the saving of property for the benefit of all concerned was just and proper, and that it could not properly be considered as furnishing evidence that he looked upon the timber as his own and therefore saved it; that the specifications of the raft were not evidences of its contents; that he was not bound by such measurement; that he had the right to examine the raft and see for himself that it contained the quantity plaintiff said it did; that sufficient reasonable time was not allowed him for that purpose before the loss of the raft. I placed these and other views suggested at the trial on behalf of the defendant before the jury, as the grounds on which he resisted the plaintiff's right to recover.

I further stated that if defendant's servants picked up the floating timber with a view of saving it for Messrs. Gilmour & Co., of course that was a circumstance which would weigh with them against defendant: if, on the other hand, that was done was for the purpose of saving the timber for plaintiff, then it would not militate against defendant: that it was evidence to go to them, to be taken into their consideration.

That they were to take these and all other facts into their consideration, and then say whether the raft had been delivered to Messrs. Gilmour & Co., or not. If they were satisfied from all the facts that they had accepted it, they should find for plaintiff—otherwise, for defendant.

Per Cur.—Rule discharged.

might also be said to evince an intention of waiving any lien for the price, as the plaintiff could not have expected payment at the booms, but at Quebec, after the delivery at the booms. The argument is no doubt strong and forcible either way, but it was for the jury to decide. I think there was evidence sufficient for them to consider whether there had not been both a delivery and acceptance: I mean a delivery and acceptance that shifted the risk and changed the property if not done before, but such acceptance being only of the raft in bulk as it was purchased, and subject to being afterwards examined and checked by the specifications, or measured by defendant if he wished to incur the trouble and expense: it is not a question of acceptance on reference to the Statute of Frauds. In some points of view it may have fallen short of that; while in others, though it amounted to such acceptance, it was consistent therewith that the defendants still retained the right to inspect the timber and reject it if not the same that had been bought: the price was fixed, nothing was to be done at the boom to ascertain it; the quantity was 71,000 feet until the contrary was shewn. If the specification was looked to as a guide, it rather exceeded it. If defendant had chosen to measure it, and the quantity was less, the quantity to be paid for would be less in proportion. The plaintiff had no more to do; he was not bound to measure it; he took it to the place agreed upon; the defendant had notice thereof, but did not send men to receive it, though numbers of his servants were at hand; and considering the season of the year and the state of the weather, it was reasonable for the plaintiff to have expected that instead of the apathy manifested by the defendant's servants, a prompt and vigilant attention would have been bestowed upon a property of such large value, exposed as it was necessarily for a time outside the boom. The defendant's foreman supposed he had effectually secured it, and it was perhaps owing to a too confident reliance upon its safety that more vigilance was not exercised. It was deemed safe at whosever risk. According to the terms and spirit of the agreement the plaintiff's risk should cease upon his delivery, or taking the raft to and placing it at the booms; and when the defendant's men and tackle secured it

thereto it ought to be considered, *quoad* the risk, as having been accepted; at least it was, I think, open to the jury so to find on the evidence. And, upon the whole, however difficult to reconcile my opinion with all the cases, or however doubtful and attended with difficulty the question may be, I think the more reasonable and satisfactory conclusion is, that when lost the raft of timber was at the defendant's risk, as between the vendor and vendees, and consequently that the rule should be discharged. What defendant's men did in securing the stray timber, and the defendant's conduct after the loss, though not conclusive in proof of acceptance, were facts which the plaintiff was entitled to prove, to go to the jury with the other evidence.

The timber in the raft might have been compared with the specification with the aid of lanterns, the same night, before the return of full tide, for all I see to the contrary, however unusual, difficult or unreasonable. It was practicable, if the defendant would not receive the raft within the booms without it, and the occasion at that late season of the year was urgent.

McLEAN, J.—It was proved that the raft was towed from Carouge to the Indian Cove booms of the defendant, without any accident whatever, only one person, a clerk of plaintiff, being on the raft and in charge for him, while being towed from one place to the other. On arriving at Quebec, the master of the steamer was about to put the raft in defendant's boom, above the long wharf, and two persons came out from the wharf on the booms, and told him to take the raft below the long wharf. It was in consequence taken lower down to the place desired, and there it was fastened to the defendant's boom—ropes and assistance being given by defendant's men in securing it. By the testimony of the master of the steamer, and also by the evidence of McCrae, plaintiff's clerk, it appeared that the raft arrived at the booms some time before dark, and that the defendant's agent and servants had notice of its arrival. No formal delivery was made, but McCrae swears distinctly that Mr. White, defendant's clerk, said, when informed of its arrival, that he would send men to

It appeared in evidence (*coram Burns, J.*) that plaintiff owned a large quantity of saw-logs in his boom at Belleville, on the east side of the river, in June, 1853.

It seemed there was or had been a firm of Bigelow & Gilbert, and that the plaintiff had dealings or negotiations with them, and that Hanford Colborne, or Colborne & Bickford, took their place. That previous to the bargain next mentioned, said Colborne & Bickford had been partners, apparently in the lumber business.

That in June, 1853, Colborne, Bickford, Bigelow, and a fourth person not named, (probably Gilbert or Cross, their agent,) came to the plaintiff to speak of his mills; that eventually a writing was drawn and executed under seal by Hanford Crawford, in the absence of plaintiff; that afterwards, the next day or so, Bickford and a person named Cross, who was an agent of (query) Crawford or Colborne, came with it to the plaintiff, who, objecting to some portions of it, altered it, and then signed and sealed it also, Colborne's name being already to it.

It is a memorandum of an agreement made the 24th June, 1853, between the plaintiff and Colborne, whereby, in consideration of \$1000 to him in hand paid by said Colborne, the receipt whereof was acknowledged, the said plaintiff agreed to sell and deliver, and thereby sold and delivered to said Colborne a lot of good, sound, merchantable, standard pine logs, then in the said plaintiff's booms at his mills, said logs to be measured and average 20 inches at small end, estimated to be about 15,000, and marked with the "wheel," which was known to be plaintiff's mark; for which said Colborne agreed to pay 4s. currency for every standard log, \$3000 down, and \$5000 to Bigelow & Gilbert on the 6th of July then next, and the balance to be paid as said plaintiff's paper became due, between the 6th July and 1st August, which was to be paid in drafts of three months. The said plaintiff further agreed to furnish the said Colborne with 1000 logs of like quality as above, at the same price, to be delivered in one year from that date, in boom at plaintiff's mills; said logs to be paid for when so delivered. *Said Colborne is to furnish men to put said logs in the booms.*

The said plaintiff also agreed to rent or lease to the said Colborne his saw-mills at Canniff's Mills, with all the fixtures now about said mills, necessary for the manufacture of lumber, for one year, with the privilege of three, at the yearly rent of £300 currency per year.

The said plaintiff further agreed to put in a good and substantial boom immediately, for the better securing of said logs, said boom to extend up as far as the logs were then boomed. He also agreed to furnish ground sufficient for the piling and seasoning the said lumber when manufactured from said logs, —the rent for said mills to be paid quarterly.

Signed, sealed and delivered.

JOSEPH CANNIFF. [L.S.]

HANFORD COLBORNE. [L.S.]

(Not witnessed.)

The words "said logs to be measured, and average 20 inches at the small end," and "*said Colborne to furnish men to put said logs in the booms,*" were interlined, in a different handwriting from the residue. The latter, because plaintiff objected to being at the risk and expense of putting the logs to be furnished in the boom.

It was supposed by witnesses called by plaintiff that Bickford and Colborne were partners at that time. It turned out that the actual number of logs then in the booms was 7700.

It was said that Bickford had acceptances at the time, which he gave to plaintiff, but which were retired unpaid. These were produced.

1. Dated Belleville, 8th July, 1855, drawn by plaintiff at three months, payable to his own order for \$800, payable at the Mechanics' & Farmers' Bank, Albany N. Y., and charge to the account of H. C. Addressed to H. Colborne, Oswego, and accepted by him in his own handwriting. Protested for non-payment the 11th of October, 1853.

2. Dated Belleville, July 9th, 1853, drawn by plaintiff, to his own order, at three months, for \$1000, payable like the last and charge to account of Colborne & Bickford, addressed to Colborne & Bickford, and accepted "Colborne & Bickford," in Bickford's writing. Protested for non-payment, 12th October, 1853.

3. Dated Belleville, July 11th, 1853, drawn by plaintiff to himself or order, at three months, for \$1500, payable like the two last, addressed to Colborne & Bickford, and accepted by them, in Bickford's handwriting. Protested for non-payment 14th October, 1853.

That Colborne being spoken to on the subject, said he was aware of it, and had telegraphed to have the first one paid, and that he and Bickford would get the other two out of the way.

There is another paper dated Belleville, 28th July, 1853, stating that in consideration of one draft for \$1200 and one for \$1000 accepted by Colborne & Bickford, he (plaintiff) had that day given his note for £550 to R. K. Bickford, one of the firm; said drafts to be taken up by the maker (plaintiff.) (Signed) Joseph Canniff—Colborne & Bickford.

It was further given in evidence that the three drafts had been negotiated through the Commercial Bank at Belleville, and that when they came back, the plaintiff went to Bickford (who had remained and attended to the business at Belleville,) and asked for security; that Bickford then, in November, delivered the lumber in question in security at the mill; that the bank agent insisted the plaintiff should have it in security, as the bank held the bills, and that the lumber was insured by plaintiff, and the receipt left with the agent, that the bank might be made sure.

One of the plaintiff's witnesses said he was present, with another witness, when the lumber was delivered to the plaintiff, to secure him against the drafts mentioned, and others which came back. The other said that he was present at the delivery of the lumber by Bickford to plaintiff, in the fall of 1853. That he (B.) said to plaintiff, that he delivered it over to plaintiff,—the lumber being in sight at the time he was called upon to witness the transaction, and the lumber being piled along the ground.

This seems to have been lumber made of the logs sold by plaintiff to Colborne. There was a written memorandum respecting the pledge of it to the plaintiff, in November, not produced at the trial, but the evidence represented it as having been drawn up in the plaintiff's office, which was

close to the lumber yard, and from which some of the lumber could be seen; and it was alleged that after it was signed by Bickford, he and the plaintiff went outside, and in sight of the lumber he (B.) declared its delivery to the plaintiff, as also the logs then in the boom; but no piece of it seems to have been actually touched or delivered in the name of the whole, nor did it appear that it had been removed, or the plaintiff's possession continued, otherwise than constructively, from its remaining where it was at the time of the transaction undisturbed by either party.

Colborne was at this time absent in the United States, and does not seem to have been at Belleville after the bargain of July, 1853, until the spring of 1854, Bickford and others carrying on or superintending his business at Belleville.

That in the spring of 1854 Colborne came, Bickford being then gone, and objected to the alterations that had been made in the agreement, declaring he had not before seen it, though a copy was left with Bickford. He denied Bickford's authority to make such alterations. That plaintiff did furnish more logs in the spring of 1854; that Colborne did find men to boom them for a short time, and that the lumber made thereout was piled with the lumber of the previous year. Also, that though often spoken to respecting the drafts, he did not repudiate. Signed by Bickford & Colborne.

It appeared further that after Colborne came to Belleville in 1854 he confessed judgment to Clark, upon which a *Fi. Fa.* against his goods issued, the 19th May, endorsed to levy £3000 and upwards. It was received by the sheriff the same day, and the lumber in question seized and sold under it to the defendant, who was acting in behalf of Clark, after which it was replevied and this action brought. The lumber was said to have been delivered in security for the three acceptances which Colborne should have retired—not sold to the plaintiff—and remained piled on the same ground where it had been originally placed, being upon part of the premises demised to Colborne.

It was contended by defendant's counsel:

1. That there was no evidence of a change, and continued change of possession.

2. That it was not shown that Colborne and Bickford were in partnership.

Colborne and Bickford were then both called and examined for the defendant.

Colborne said it commenced with Bigelow & Gilbert, whose place he took, and to whom he paid the \$5000, as per agreement. That he drew on Clark for payment thereof, and was indebted to him over \$8000. He denied Bickford's being a partner or interested in the premises,—or another,—otherwise than as engaged to serve him (Colborne) at a salary of wages. But he admitted they had been in partnership previously, and that it was known to the people in Belleville,—alleging that it ended in March or the 1st April, 1853, but not publicly notified. He denied Bickford's authority to accept drafts in their joint name, or in his (Colborne's) name, with respect to the transactions with the plaintiff.

He said he had left three drafts with Cross amounting to \$3000 and paid them, and that such \$3000 and the \$5000 to Bigelow & Gilbert overpaid plaintiff, because the logs fell short; that the \$800 draft had since been paid, he thought, by the \$1000 draft of September or October.

He, said plaintiff, had given Bickford paper to meet what he (C.) had overpaid, and that Bickford gave the plaintiff paper. He also spoke of other drafts, and money or paper transactions, the object of which was to show that the three drafts first mentioned had been paid; but he seemed to admit being bound to take up those drafts.

Bickford said his partnership with Colborne ended the 1st April, being dissolved in Kingston, and no notice thereof given, after which he served at a salary. That he gave acceptances in the name of Bickford & Colborne, to retire plaintiff's paper from the bank; that Colborne was not consulted about it, nor did he know of it *till some time afterwards*; that it was talked over at the bank whether he had authority to accept in the partnership name, and that he could not do so in Colborne's name alone, but considered he had authority to sign the acceptances.

He admitted giving a memorandum upon the lumber, being informed by plaintiff that the bank would not carry on the

notes unless it had some security on the lumber—he thought in December. That the memorandum was to give a *lien* on the lumber, to the plaintiff to satisfy the bank. That plaintiff said he did not want a bill of sale, and only wanted to satisfy the bank, and was told by B. he had no right to give a bill of sale. That he gave no other possession than the lien by the paper; that it was done in the office, and that they did not go out to the lumber, or make any delivery, and had no authority to sell or mortgage it, but that he intended to give a lien upon it, but did not tell Colborne. That plaintiff told him to keep it quiet and nothing could come of it. That by the agreement in October, Colborne was to procure \$2300 not \$5500, —which the \$800 and \$1500 bills would equal, and that the \$1000 bill must have been one of the accommodation notes which plaintiff was to retire; and that if the \$2000 draft on Hunt had been paid, it would have squared all due to the plaintiff. That he left for good on the 1st of May, 1854.

He said he had delivered \$1000 draft to the plaintiff, which Colborne had retired, plaintiff saying he wished to show it to the bank, but, though asked for it, it had not been returned. Colborne said he also had the property insured.

The learned judge left the jury to decide :

First. Whether Bickford was a partner with Colborne, or had authority to pledge the lumber in security to the plaintiff.

Second. As to the debt due—that the \$2000 draft on Hunt was not paid, which left the old debt due to that extent at all events, and the amount due was not to be determined in this action.

Third. Whether there was a delivery of the lumber, and an actual or continued change of possession of this lumber. If not, or if Bickford was neither partner nor authorized to pledge it, plaintiff would fail.

And told the jury that the plaintiff must establish either a partnership, or authority *aliunde* in Bickford, and an actual and continued change of possession, or fail.

The jury found for the plaintiff.

No question was raised on defendant's part, that it was necessary for plaintiff to produce the written paper giving over the property.

Colborne & Bickford seem to represent that a \$1000 draft given in September or October (and paid) covered the \$800 draft, and that the \$2000 draft on Hunt included \$300 for rent, and \$260 for horses. That plaintiff was only entitled to \$2300 out of the two drafts (*qy.* \$800 and \$1000 ?) together with \$300 and \$260—\$560; in all \$2860

Whereas, 7700 logs at 4s. each, equal.....	\$6160	or	£1540
The three drafts in July amount to	3300	or	825
Leaving	\$2860	or	£715

Excluding interest, charges, &c.

In Easter Term, 19 Vic., (1855,) *Hagarty*, Q. C., obtained a rule on the plaintiff to show cause why the verdict should not be set aside, as against law and evidence—the weight of evidence, and for misdirection.

In Trinity Term (Aug. 1855,) *Wallbridge* showed cause, and contended there was sufficient evidence of a delivery of the lumber, and that the partnership being disputed was left to the jury, and that Bickford had authority to mortgage the lumber as agent, if not as co-partner of Colborne. That the defendant purchased at sheriff's sale as agent of Clark, and is therefore in the same position.

That no affidavit is filed, denying the merits of plaintiff's recovery.

Hagarty in reply, contended—there was misdirection, if the evidence was insufficient. That the property vested in Colborne, and he was possessed of the land on which the lumber lay. That whether Bickford was a partner or not was of little moment, the property being vested in Colborne solely by the contract. That they were not partners *quoad* the plaintiff in this transaction, and nothing occurred afterwards to alter the case. That the paper containing the alleged lien was not produced for the Court to judge of the legal effect of it. That Bickford denied authority, though he did the act. That as a mortgage it would be invalid without registry or actual possession. That it is uncertain whether the memorandum imports a mortgage or a lien, and whatever

it might be, there was no delivery or change of possession in fact.

MACAULAY, C. J., delivered the judgment of the Court.

The plaintiff did not produce the memorandum, and in its absence it cannot be regarded as importing more than his witnesses and Bickford represent,—merely a pledge of the lumber to secure the three bills of July, 1853. In the conflicting nature of the evidence, and in the absence of bills and papers referred to but not produced, it is impossible to decide satisfactorily what Colborne owed the plaintiff. That he was indebted to him to a large amount was the only reasonable inference from the whole evidence.

Then, first, had Bickford authority to pledge the lumber, either as partner or agent?

2nd. If he had, was delivery made and possession rendered continued sufficient to support such lien.

It was, if anything, either a mortgage or a pledge.

As an oral mortgage, it would be invalid. As a written mortgage it required registration. As a pledge, the possession, if received, was not retained, but the goods remained in *status quo*, where they were, on the pledgor's premises, and ostensibly in his possession, custody and control. Such an arrangement cannot defeat the rights of an execution creditor.

Per Cur.—Rule absolute for a new trial without costs.

ROBERT COULTER V. CHRISTOPHER E. LEE.

Consideration—Partial failure of.

To a declaration on a promissory note defendant pleaded as to £187 10s., parcel, &c., that on, &c., the plaintiff represented that he was the owner of certain lands, as the fact was, and that he was the equitable owner of a certain other lot of land under one R., who had purchased from the Crown and held the same for the plaintiff; and plaintiff then falsely and fraudulently represented to the defendant that he could procure said R. to make an assignment of the said lot to the defendant; and the said plaintiff having so represented, and offering to sell all his right, title and interest in the above lands at, &c., per acre, amounting to £677 5s., payable £250 cash and the balance by two notes of the defendant, defendant was induced by such representations to accept the aforesaid offer; and thereupon—to wit, on &c., and contemporaneously with the making of the said note—plaintiff by deed poll conveyed to defendant all his (plaintiff's) right, title and interest in and to the several lands above mentioned: then avers payment of £250 in cash and the making of the two promissory notes, one of which is the note declared on.

The defendant then avers that the plaintiff, at the time of the making of the said promissory note in the declaration mentioned, had no right, title or interest in the said lot of land, and did not nor could procure said R. to assign to the defendant his right, title and interest in the said lot, but said R. has hitherto refused and hath incapacitated himself from assigning to the defendant by assigning to another person.

Held bad on demurrer, on the ground that a partial failure of consideration is no defence when the amount of the failure is unlimited.

Writ issued on the 6th of December, 1854: declaration, on the 19th of December, 1854. Assumpsit by plaintiff as payee against defendant as maker of a promissory note for £213 12s. 6d., with interest, dated 6th May, 1854, payable six months after date, with an averment that the interest amounts to a large sum—to wit, the sum of £6 11s. 6d.

Plea—As to £187 10s., parcel of the sum of £213 12s. 6d. in the promissory note in the declaration mentioned, and all damages demanded by the plaintiff in respect thereof, defendant saith that heretofore—to wit, on the said 6th day of May in said declaration mentioned—the plaintiff represented to the defendant, as the fact was, that he had the right, title and interest in and to certain the following lands—that is to say, to the east half of lot No. 13 in the second concession of the township of Tosorontio, in the county of Simcoe; lot No. 19 in the fifth concession of said township; lot No. 32 in the fifth concession of said township, and lot No. 17 in the sixth concession of said township; and said plaintiff at the said time represented to the defendant that he was the equitable owner of lot No. 14 in the second concession of

said township; which said equitable ownership of him the plaintiff, as he alleged, arose as follows: namely, "that one Alexander Ruthven had purchased the right and title to said last mentioned lot (which said lot contains two hundred acres of land) from the Crown, who at the same time of such sale to him had the right to grant the same, but that the said Alexander Ruthven had purchased the same on behalf of the plaintiff, and held the same as trustee for the plaintiff; and the said plaintiff then falsely and fraudulently represented to the defendant that he could procure the said Alexander Ruthven to make an assignment of his interest in said lot No. 14 to the plaintiff, and that the said Alexander Ruthven, upon being called upon to do so, would assign to the defendant all his interest in the said land—to wit, the said lot No. 14; and the plaintiff having so represented, and offering to sell all his right, title and interest in the above lands to the defendant (there being in the whole in said lands eight hundred and sixty acres of land) at and for the price or sum of fifteen shillings and ninepence per acre, amounting in the whole to six hundred and seventy-seven pounds and five shillings, the said sum to be paid as follows: that is to say, "the sum of two hundred and fifty pounds cash down, and the balance to be secured by the promissory notes, to be made for two hundred and thirteen pounds twelve shillings and six pence each by the defendant, payable to the plaintiff; the defendant was induced by the said representations of the plaintiff to accept the offer so made, and thereupon, on—to wit, on the said sixth day of May, and contemporaneously with the making of said note, the said plaintiff executed to the defendant a deed poll, which said deed poll, sealed with the seal of the plaintiff, the defendant brings here into court, by which said deed poll the said plaintiff, for and in consideration of the sum of six hundred and seventy-seven pounds and five shillings, therein expressed to have been in hand well and truly paid by the defendant to the plaintiff, upon the execution and delivery thereof, and the receipt whereof is thereby acknowledged, bargained, sold, assigned and transferred unto the defendant all his the plaintiff's right, title and interest, benefit, claim and demand, whether at law or in equity or otherwise

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said township; which said equitable ownership of him the plaintiff, as he alleged, arose as follows: namely, "that one Alexander Ruthven had purchased the right and title to said last mentioned lot (which said lot contains two hundred acres of land) from the Crown, who at the same time of such sale to him had the right to grant the same, but that the said Alexander Ruthven had purchased the same on behalf of the plaintiff, and held the same as trustee for the plaintiff; and the said plaintiff then falsely and fraudulently represented to the defendant that he could procure the said Alexander Ruthven to make an assignment of his interest in said lot No. 14 to the plaintiff, and that the said Alexander Ruthven, upon being called upon to do so, would assign to the defendant all his interest in the said land—to wit, the said lot No. 14; and the plaintiff having so represented, and offering to sell all his right, title and interest in the above lands to the defendant (there being in the whole in said lands eight hundred and sixty acres of land) at and for the price or sum of fifteen shillings and ninepence per acre, amounting in the whole to six hundred and seventy-seven pounds and five shillings, the said sum to be paid as follows: that is to say, "the sum of two hundred and fifty pounds cash down, and the balance to be secured by the promissory notes, to be made for two hundred and thirteen pounds twelve shillings and six pence each by the defendant, payable to the plaintiff; the defendant was induced by the said representations of the plaintiff to accept the offer so made, and thereupon, on—to wit, on the said sixth day of May, and contemporaneously with the making of said note, the said plaintiff executed to the defendant a deed poll, which said deed poll, sealed with the seal of the plaintiff, the defendant brings here into court, by which said deed poll the said plaintiff, for and in consideration of the sum of six hundred and seventy-seven pounds and five shillings, therein expressed to have been in hand well and truly paid by the defendant to the plaintiff, upon the execution and delivery thereof, and the receipt whereof is thereby acknowledged, bargained, sold, assigned and transferred unto the defendant all his the plaintiff's right, title and interest, benefit, claim and demand, whether at law or in equity or otherwise

howsoever, of, in and to the several lands and every of them respectively—namely, in said deed poll,—the said lands, tenements and premises therein mentioned being those hereinbefore mentioned; and the defendant avers that at the date of execution of said deed poll he paid to the plaintiff two hundred and fifty pounds, part of the said sum of six hundred and seventy-seven pounds six shillings therein mentioned, and made to him his two several promissory notes for two hundred and thirteen pounds twelve shillings and six pence each, to secure the balance of the said sum of six hundred and seventy-seven pounds and five shillings therein mentioned, one of which said notes is the note in the said declaration mentioned; and the other note which said defendant then gave is not yet due.

And the defendant avers that at the date of the execution of said deed poll and of the making of said promissory note in declaration mentioned, the plaintiff had no right, title or interest in the said lot No. 14 to convey or assign; and the plaintiff did not and could not then or since that time procure the said Alexander Ruthven to assign to the defendant his right and interest in said lot No. 14 or any part thereof, although the said plaintiff and said defendant, after the making of the said note in the said declaration mentioned—to wit, on the seventh day of May, in the year of our Lord one thousand, eight hundred and fifty-four, and frequently since that time—requested the said Alexander Ruthven to assign his right and interest in said lot to the defendant; and the said Alexander Ruthven then and ever since has refused to assign his right and interest therein to the defendant, although the defendant was then and ever since has been ready and willing to accept an assignment of his right and interest therein.

And the said Ruthven has since that time incapacitated himself from conveying his right and interest therein to the defendant, by conveying his right and interest therein to another party other than the defendant or said plaintiff; concluding with a denial of possession by defendant: verification.

Demurrer to plea, on the grounds that the circumstances set forth in the plea do not shew any defence, because the

partial failure of consideration or fraud on the part of the plaintiff to the extent shewn by the plea, cannot be set up, the defendant still insisting on and taking benefit from the conveyance set out in the plea.

Second. Because the failure shewn is unliquidated.

Third. Because the note sued on is one of two, and the failure applies to the other note and the cash payment as much as to this note.

Fourth. Because it is not averred that at the time of such representation by plaintiff he, the plaintiff, was aware that he had not the interest which he represented himself to have, or that he knew he could not procure said Ruthven to assign.

Fifth. Because it is not averred that there was not any other consideration for defendant's making or paying the note.

The demurrer was argued during this term. *Dalton*, in support of the demurrer: That plaintiff is only averred to have represented that he had the right, title and interest, and not that he fraudulently made such representation, which should have been averred in the plea—*Pasley v. Freeman*, *Smith's Leading Cases*; *Rawlings v. Bell*, 1 C. B. 951.

That the amount of £137 10s. is not shewn to be a liquidated sum.

That plaintiff only agreed to give his right, title and interest in the lands, and the plea shews that the defendant got that.

That a partial failure of consideration is no defence when the amount of the failure is unliquidated—*Trickey v. Larne*, 6 M. & W. 278; *Moggridge v. Jones*, 14 East 486; *Kellogg v. Hyatt*, 1 U. C. Q. B. R. 445; *Stephens v. Watkinson*, 2 B. & Ad. 320.

That the case of *Serle v. Waterworth*, 4 M. & W. 9, shews that defendant should have averred that there was no other consideration for the note than that stated in the plea.

Bead, D. B., contra, contended that the objection of there being no other averment of consideration could only be taken by special demurrer—*Lewis v. Cosgrove*, 1 Moor & Payne, 79.

He referred to *Evans v. Collins*, 5 Q. B. 804; *Collins v. Evans*, 5 Q. B. 820; *Gresham v. Postan*, 2 C. & P. 540; *Betts v. Gibbins*, 2 A. & E. 57; *Toplis v. Grane*, 5 N. C. 686.

MACAULAY, C. J., delivered the judgment of the court.

I think the plea bad. I take the rule to be that fraud avoids the security in toto though it pervade the consideration to a partial extent only. If so, it follows that the professing to answer part only of the note pleads matter (if it be a good plea of fraud) which shews it entirely void, and so indirectly answers to the whole note. If not a good plea of fraud, but of failure of consideration only, it is bad for not answering all it professes to answer, for the partial failure relied upon applies to the £250 paid and the other note as well as this.

Further, if fraud and covin be relied upon, it might be pleaded to the whole note in brief terms. And if such fraud be partial only, the defendant should have elected to repudiate the whole transaction, or to adhere to the contract and take his remedy under it, if any, for the partial damage sustained. He cannot adopt it partially and reject it partially, at least in relation to the security. He ought to restore all the consideration received on discovering the fraud, and so rescind the bargain in toto, but cannot adopt what is beneficial and reject that which is not so.

If failure of consideration merely be relied upon the difficulty is, that it affects not only the instrument partially, even as respects such failure, but that the failure in itself is indefinite in this, that all the lands are purchased together at so much an acre, and it does not follow that the want of title to the lot in question constitutes, in comparison with the whole, a partial failure to the specific amount of 15s. 9d. per acre; for in fact, it may be worth less, and only purchased together with the lands, some of which might be worth more. If, however, the note was given for the whole purchase money, and the defence was entire failure of consideration as to 200 acres of the land, I am not prepared to say it might not be a good defence, except that being a contract of sale under seal it is probable that in the absence of fraud the defendant would be without remedy at law, unless founded upon the contract itself—*Kellogg v. Hyatt* (1 U. C. Q. B. R. 445), *Tuck v. Tooke* (9 B. & C. 427), *Campbell v. Fleming* (1 A. & E. 40), *Chitty on Bills*, 72.

The price of the land retained by the defendant exceeds the sum paid £250 and the amount of this note, and if the failure as to the lot in question can be deducted, I should think, at all events, it can only be upon the last note; that is, the balance remaining after full payment for the lands retained.

Per Cur.—Judgment for demurrer.

DANIEL MACDOUGALL ET AL., ADMINISTRATORS OF D.
ROBERTSON, V. DONALD ÆNEAS MACDONELL ET AL.

Title—Covenant for—Executors—Powers to sell lands to.

In covenant by plaintiffs, administrators, &c., against defendants, executors, &c., on a deed, whereby defendants covenanted with plaintiffs intestate that they at the time of the making of such deed were the true, lawful and rightful owners of the land, &c., and then were seized in fee in their own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in the said lands, without anything to alter, charge, change or encumber the same. It appearing on the trial that the defendants claimed under a clause of their testator's will to dispose of any of the testator's lands in case it should be necessary for the purpose of liquidating any debt—

Held, after verdict for plaintiff, that there should be a new trial on payment of costs, to enable defendants to prove the existence of debts of the testator—a fact material to maintain the sale.

Held also, that if the power were well exercised the estate passed to the heirs at law, and in that event the action was not maintainable by the executors, but by the heir at law.

Writ issued 12th March, 1855. Declaration: that in the lifetime of the said Robertson—to wit, on the 29th of May, 1847,—by indenture of that date, in consideration of £65, defendants granted, bargained and sold to said intestate lot No. 17, on the north side of Eighth-street, town of Cornwall, to hold, freed and discharged from all incumbrances to said intestate and heirs, in fee. That defendants covenanted with said intestate, his heirs and assigns, that defendants then were the true, lawful and rightful owners of all and singular the said parcel or tract of land, and then were seized in their own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple of and in the said lands in and by the said indenture granted, bargained, sold, &c., without any condition, limitation or use or user, or any other matter or thing to alter, charge, change, encumber or defeat the same.

Yet that defendants before—at the time or since the execution of the said indenture—were not the true and lawful

owners of the said lands, or any part thereof, nor were they seized in fee as above mentioned, contrary to the true intent and meaning of the said indenture and of defendants' covenant in that behalf.

Second count: Similar indenture and covenant of like date as to lot No. 16, south side of Ninth-street, Cornwall, and like breaches.

Pleas to first count: That at the time of the execution of the said indenture defendants were the lawful owners, &c., and seized thereof in fee in the terms of the covenant—to the country and issue.

To the second count: A similar plea.

It appeared at the trial at Cornwall, before Macaulay, C. J., C. P., that lot No. 17, north side of Eighth-street, was granted to William Caydermand 23rd of January, 1882, and lot No. 16, south side of Ninth-street, was granted to Robert Putman 17th of January, 1883: and there the plaintiffs rested their case.

The defendants proved the will of the late Duncan Macdonell, dated 19th of March, 1884, with two codicils dated 22nd and 24th of March, 1884; and it was admitted that the testator died seized in fee of the lands in question.

The defendants relied on the seventh clause of the first codicil, as follows: "I hereby authorize and declare my wish to empower my aforesaid executors and administrators, should it be necessary to liquidate any debt or debts that is or may become due to any person or persons now or hereafter, to sign and execute any conveyance or title for any part or portion of my wild lands or other lands belonging to the estate, and their act to be considered effectual in law; and my last request is, that the said executors and administrators are also empowered to collect all outstanding debts and book accounts due to my estate, and also to pay all lawful debts due by the estate up to the time of my decease."

The will (clause No. 10) appointed William Frazer, Alexander Macdonell, John Macdonald and Duncan McMillan executors and administrators, "to act in behalf and on part of my family, as they may see fit, just and lawful to do."

Number five bequeathed the remainder of his wild lands,

together with town lots, to be equally divided between his sons and daughters.

The second clause of the first codicil bequeaths to his son Duncan five town lots in Cornwall, including No. 17 on the north side of Eighth-street, and 18 on the south side of Ninth-street, in fee.

Number four: Should any of the lands devised be required to liquidate debts, the lands devised to the others to contribute. The second codicil empowered the executors to sell wild lands for the support of children, &c., and devised to them, and appointed Donald Aeneas Macdonell executor in addition.

The defendants were the surviving executors when the deeds were executed, but did not prove the existence of any debt requiring the sale of the lots to liquidate the same.

The learned Chief Justice ruled in favor of the plaintiffs, and a verdict was rendered in their favor for £196 8s. 8d.

During this term, *Brough* moved for and obtained a rule *Nisi* on the plaintiffs to shew cause why a nonsuit should not be entered, but the rule should be to set aside the verdict for misdirection, as no leave to move a nonsuit was reserved. It was contended the defendants should shew their right to convey by proving a debt or debts as the condition upon which alone they could do so, in execution of the power conferred by the will.

But it was not contended that the plaintiffs, as administrators, could not sue on the covenants declared upon, or that the covenants were not for seisin in fee, &c., and not merely for right to convey.

It was said the plaintiffs' intestate had never entered, and had not been evicted, but that the vendee of the devisee was possessed.

Reference was made to the cases of *Kingdon v. Nettle*, 1 M. & S. 355; *S. C.* 4 M. & S. 55; *Jones v. King*, 4 M. & S. 188; *Chamberlain v. Williamson*, 2 M. & S. 408; *Platt on Covenants*, 521-2; *Wilkins on Executors*, 518, 520.

MACAULAY, C. J., delivered the judgment of the court.

We think the rule should be made absolute for a new trial on payment of costs, to enable the defendants to prove the

existence of debts—a fact material to be proved, to justify and sustain the sale.

It appears that if that fact were proved, the breach of covenant would still remain unanswered, being an absolute covenant for seisin in fee, &c., whereas at best the defendants had only a power over the fee to sell it, and were not seized thereof.

But if the power was well exercised it would follow that the estate passed by force of the will; and if so, it vested in the donee of the power, and descended to his heirs notwithstanding the breach of covenant; and in that event the action is not maintainable by the executors of the testator, but by his heir at law; the loss by the breach of covenant would be nominal only, and in that light the verdict is too high, and the loss, whatever it may be, would seem to be to the inheritance, and not to the personal estate of the devisee or testator.

Per Cur.—Rule absolute.

DANIEL HARVEY SHIPMAN, ADMINISTRATOR, v. NORMAN SHIPMAN.

Evidence—Admissibility of—Debts, payment of intestate's.

In an action of trover by plaintiff as administrator, &c., where it appeared that defendant had appropriated certain goods of the intestate, but had paid debts of the intestate to the amount of the value of the goods so appropriated, which however was not pleaded—*Held*, after verdict for defendant, that the plaintiff was entitled to a verdict, as evidence of such payment was not admissible. The rule was however made absolute on terms, &c.

TROVER brought by the plaintiff as administrator to recover from the defendant the value of certain articles of household furniture, and of some grain, flour, &c., alleging the property to be his, as administrator as aforesaid after the death of intestate—to wit, on the 12th of March, 1855. Conversion on the same day. Defendant pleads not guilty, and not possessed.

At the trial, before *Richards, J.*, at the Spring assizes for 1855, held at Perth, for the united counties of Lanark and Renfrew, it appeared that Daniel Shipman, the father of both plaintiff and defendant, died on the 3rd of October, 1852,

intestate. Plaintiff was then residing in one of the United States of America—out of Upper Canada.

On the 19th of October of that year an agreement under seal was entered into, described as being by and between the parties thereunder written, heirs of the late Daniel Shipman, of the township of Ramsay, in the county of Lanark, in the province of Canada, miller, whereby Sylvanus R. Shipman, Norman Shipman, Samuel Shipman, Jehoida B. Shipman, Mellison Shipman, Catharine Rose or Shipman, Rachael Shipman and Olive Shipman, mutually agreed with each other that, as far as they had any interest in the estate of the deceased, and during the time the same might be encumbered—viz., for four years or thereabouts,—and during the said period the business should be conducted by Sylvanus, Norman and Samuel. Sylvanus was to take charge of and conduct the saw-mill, Norman the grist-mill, the slide to be conducted under the joint management of Sylvanus and Norman (but in the event of the plaintiff returning to that part of the country, and wishing to remain on the estate, then the slide to be under his care; he was to keep books, and account for the profits in the same manner as the others, and to be allowed at the same rate per annum for his services; and Samuel was to take charge of and manage the farm, cattle, live stock, farm implements, &c., during the time the estate might be encumbered. They were each to keep regular day books; wherein the transactions and accounts should be regularly kept, and once in each week to be entered into a general ledger, wherein the whole accounts of the estate will be fully and fairly exhibited; and they were each to have out of the estate for their services £75 per annum, besides an allowance for any necessary assistance in carrying on the business; the profits arising from the said mills, farm and slide to be accounted for every week and deposited in the hands of Smith Coleman (who was to act as treasurer of the estate) to form a fund for the liquidation of the debt thereon.

It was also provided by the agreement that Jehoida B. Shipman (being a minor) should be under the care of Norman, and in accordance with his own desire should be allowed to work in the grist-mill and to be provided in necessary food

and clothing and such monthly wages as might be agreed upon; that Mellison Shipman, being in a very debilitated state of health, should remain in the house, and that £12 10s. per annum should be allowed her from the estate, besides what flour she might require for her own use, with a stove and firewood; and as it was indispensably necessary that some person should be constantly in attendance upon her, it was agreed that her two sisters Rachael and Olive should remain in the house to attend to her necessities, and one-half of a flat of the dwelling should be set apart for that purpose, and Rachael and Olive to be supplied from the estate with a sufficient quantity of flour for their own use.

That as to Mrs. Catharine Rose, daughter of the intestate, then residing in the dwelling house and having apartments therein for her own use, by an agreement previously entered into and to continue during her husband's absence, provision was thereby made that, should any unforeseen event happen with regard to her husband's return at the expected time, or she should be otherwise left destitute, that she should be allowed to retain her apartment and to be furnished with a suitable quantity of firewood and the sum of six pounds yearly.

There was also a provision for the widow in lieu of dower; and it was then declared that it was the true intent and meaning of the agreement being entered into that the debt might be liquidated and paid, that the whole estate might thereafter be more advantageously divided amongst the heirs. The widow also became a party to the agreement by signing it.

Under this arrangement the parties went on, and the plaintiff himself came in the Spring of 1854 and took charge of the slide, and obtained letters of administration on the 15th of April, 1854. On the 14th of June, 1854, Sylvanus Raben Shipman, Norman Shipman and Samuel Shipman entered into a bond to plaintiff, as administrator of the estate of the late Daniel Shipman, in the penal sum of £500, to be paid to plaintiff as such administrator: there was a recital of the agreement hereinbefore referred to, and a statement that it was then desirable that an account should be rendered of the monies paid out and received by them respectively, and that the business, so far as the said three brothers had conducted

it, should be wound up, and that the indebtedness of any of them to the estate should be ascertained and made known, that the same might be paid over to the parties entitled thereto; and David Campbell and Matthew Anderson were appointed arbitrators to investigate the said accounts: then followed the condition that if the obligors should abide by and keep the award of the arbitrators the bond should be void. On the 3rd of August, 1854, the arbitrators made their award, in which they state that, having heard the statements of the parties and having examined the respective books and accounts produced, and having investigated the transactions of the parties, awarded that there was justly due and owing to the estate from Sylvanus Ruben Shipman £169 9s. 5d., and that the same should be paid to the administrator within ten days from the date thereof; that Samuel Shipman was justly owing the sum of £24 9s. 7d., of which £12 18s. 8d. was due the mill department, the same to be paid forthwith; that the estate was indebted to Norman Shipman £7 13s. 1½d., which was to be paid him forthwith, but that all the money paid to Mr. Coleman, amounting to £199 13s. 1½d., the book accounts, amounting to £260 12s. 1d., besides the grain then in the mill, should belong to the estate.

They further found there was in the hands of the administrator, being the proceeds of the slide, the sum of £220 1s. 2½d.

After directing who should pay the expense of the award, they remark that they have taken no notice of the salaries of Norman and Samuel Shipman; the amount being previously agreed upon, the administrator will pay them the same.

Before the signing of the agreement an inventory was taken of the personal property of the intestate, including £100 in cash, which amounted to about £600. The household furniture was divided into eleven lots, being the number of heirs, and one of the shares appropriated to each of the heirs by lot. The defendant took as his share one of the lots valued at £8 14s.; all this was done before plaintiff came down, and before letters of administration were taken out, the parties at that time not deeming it necessary to take out letters.

Plaintiff came to that part of the country in the spring of 1854. After he came down, for the purpose of collecting

debts, it was deemed advisable that letters of administration should be taken out; and by consent of all parties they were awarded to plaintiff on the 15th day of April, 1854. Intestate before his death had borrowed a large sum of money, amounting to about £1500, which was secured by mortgage on the real estate. Defendant, after plaintiff came down, and after the issuing of the letters of administration, gave plaintiff a receipt for the articles of household furniture which fell to his lot, valued as before mentioned at £8 14s. During the trial evidence was given to shew that defendant had disposed of about 150 bushels of wheat; and there were some other articles of small value, such as rye, barley, &c., amounting altogether to about £5 3s. 3d., of which evidence was offered to charge defendant, as for a conversion. It was also sought to charge him with the value of the household furniture for which he had given a receipt. It was further urged that defendant was liable for the value of 22½ yards of bolting-cloth, valued at £11 7s. 6d. As to this latter article, it was shewn to have been returned to plaintiff before action brought, except about, one witness said, not a yard, and defendant, a quarter of a yard (valued at about 10s. a yard), which was used in mending the bolt of the mill, and was only taken down to the mill by defendant for the purpose of taking off what was necessary for mending the bolt, and was returned to plaintiff as soon as it was known that he was likely to create any difficulty about it.

The defendant contended that there was no evidence to shew that defendant had converted any of the articles to his own use; that, in fact, he had used them in the course of the business conducted by him under the agreement, and had accounted for them before the arbitrators, who had awarded that as to all these matters, a certain sum was due defendant from the estate.

It was objected that what was shewn was no defence to plaintiff's claim in this suit, and if it was, under these pleadings there could be no evidence given to shew a reference to arbitration and award; that the only way in which defendant could set up any defence was that he had paid, certain debts of the intestate of the value of the goods, &c., converted, with

the approval of the administrator, and that he could *recoup* the damages to that extent.

The presiding judge took this view of the case, and left it to the jury to say how much of the goods, &c., or of their value, had been paid by defendant towards the debts of the intestate with the approval of the administrator; and to allow that by way of reduction of the damages.

It was given in evidence that defendant had paid plaintiff himself, and to the creditors of the deceased, after his death, to the amount of £76 19s. 7d., and in addition, the sum of £12 15s 4d. for taxes due on the land before the death of the intestate. He exhibited an account at the arbitration, showing the receipt of the wheat, amounting to £37 10s., and of some of the debts due to the intestate, amounting to £13 4s. 9d., and also an account of the debts he had paid, which plaintiff expressed himself satisfied with.

The presiding judge then thought that the only questions remaining for the consideration of the jury, were the flour, peas, barley, &c., amounting to £5 3s. 3d., and the one-quarter yard of bolting-cloth taken to mend the bolt. Defendant, on being sworn, admitted that he had made use of the bolting-cloth in the way mentioned, and the articles above referred to, which he had not entered as he had the wheat. He stated that although not entered in specie, that he entered everything that went out of the mill, and the estate got the benefit of it, and that he did not appropriate any of the grain to his own use, and that at the arbitration nothing was said of the coarser grains.

The jury were told if they believed that plaintiff had, after he became administrator, approved and ratified the appropriation of the last mentioned articles, valued at £5 3s. 3d., as well as the small piece of bolting-cloth, to the payment of the intestate's debts, and that debts to their value over and above the £37 10s. were paid by defendant, then they might find for him as to them. But even if defendant did appropriate their value to paying the debts of the intestate, yet they should find nominal damages for plaintiff, as that could only go in mitigation of damages. The jury found for defendant.

During Trinity term last, *Cameron, H.*, obtained a rule

Nisi to set aside such verdict, as being contrary to law, evidence and the charge of the learned judge who tried the cause.

Vankoughnet, Q. C., shewed cause.

MACAULAY, C. J., delivered the judgment of the court.

On these pleadings and the evidence the plaintiff was strictly entitled to recover. Arbitrament was not pleaded, and a conversion of divers goods was proved; but defendant proved payment of debts in mitigation of damages. Such evidence was not admissible as a bar, and the jury found against the direction of the learned judge.

It was perhaps material to the plaintiff to bring the action, in order to vindicate his administration to the creditors and next of kin; and he was, at all events, entitled to nominal damages.

I think therefore the rule may be made absolute to set aside the verdict, if the plaintiff consents that it shall (with defendant's assent) be entered for the plaintiff, with one shilling damages, with whatever effect it may have, so entered, upon the plaintiff's right to costs.

If the plaintiff declines a rule on these terms, the rule will be discharged: if the defendant declines, then the rule to be absolute generally, without costs, but without prejudice to the defendant's hereafter applying for leave to add a plea of arbitrament, if so advised.

Rule accordingly.

HENRY JOHN AUSMAN, ADMINISTRATOR OF HENRY AUSMAN,
v. JOHN MONTGOMERY.

Annuity—Apportionment of.

An annuity payable annually during the annuitant's life cannot be apportioned so that the annuitant's administrator can receive a proportion of such annuity, the annuitant having died within the currency of the year.

ASSUMPSIT, for an annuity. First count special. Second, account stated.

Plea—General issue. The plaintiff proved memorandum of agreement made the 22nd January, 1846, between Henry

Ausman and defendant, whereby said Henry Ausman agreed to sell to defendant all his estate, right, title and interest of and in lot No. 10, 3rd con. Markham, and to allow defendant to purchase the same at sheriff's sale this day, in consideration of said defendant paying the amount due upon the judgments against the said Henry Ausman, now in the hands of the sheriff of the Home District, and for which the same is about being sold, and upon the title being completed the said defendant to secure to the said Henry Ausman £50 annually during the life of the said Henry Ausman. The amount that may be received for the purchase money due by Ausman to one John W. Myers, and to be paid by him for the benefit of the heirs of John McClusky, if any there be, should be deducted from the annuity aforesaid. In consideration aforesaid, the said defendant agreed to purchase the said land at sheriff's sale this day, and to pay the said annuity to Henry Ausman, from and after the completion of the title by a decree of the Court of Chancery, and to secure the payment of the said annuity on good real security. Signed by Henry Ausman and defendant.

At the trial, variance was objected; the plaintiff stating in the first count of the declaration that defendant promised and agreed with said Henry Ausman, deceased, to pay to him for and during his natural life, to wit, in order to provide maintenance and sustenance for him, the sum of £50 annually—that is to say, in and for each and every year during the lifetime of the said Henry Ausman, now deceased; and a proportionate part of the said annuity to the personal representatives of the said Henry Ausman, on his death, in proportion to that part of the year which should have elapsed at the death of the said Henry Ausman, and to secure the same to him upon good real security, &c.

That the said Ausman died the 12th March, 1855, and that £41.13s. 4d. is due. The annuity alleged to commence on the 12th May, 1847.

Verdict for plaintiff.

During this term, *Jones, J. R.*, obtained a rule to set aside the verdict for plaintiff and enter it for defendant, on the ground that the annuity was not liable to be apportioned, •

and therefore plaintiff not entitled to recover, and on the ground of variance.

Cameron, H., shewed cause during the same term. Reference was made to *Howell v. Hanforth*, 2 W. B. 1016; *Hay v. Palmer*, 2 Vernon 501; *Shepperd v. Wilson*, 4 Hare, 395; *Reynish v. Martin*, 3 Atk. 331.

MACAULAY, C. J., delivered the judgment of the court.

Assuming that the English statutes on the subject of the granting annuities as they existed, when the law of England was adopted in Upper Canada, I find no authority for a court of law apportioning this annuity, either at common law or by statute, imperial or provincial. I see no alternative, therefore, but to make the rule absolute on both grounds, and to enter the verdict for the defendant for a nonsuit. The cases cited—*Howell v. Hanforth* (2 W. B. 1016), *Hay v. Palmer* (2 Vernon 501), *Reynish v. Martin* (3 Atk. 331-6); do not seem to go the length contended for by the plaintiff's counsel. *Queen Adelaide's case* (16 Q. B. 357) is quite in point; *Trimmer v. Danby* (23 L. J. Ch. 979), *Kindersley V. C.*;—*In Re Longworth* (23 L. J. Ch. 104), *Wood, V. C.*; *Beer v. Beer* (12 C. B. 60.)

Per Cur.—Rule absolute.

WATROUS V. BATES ET AL.

AND

WATROUS V. BATES AND SIMPSON.

Damages—Measure of.

Plaintiff having contracted with Sykes & Co., to furnish railway ties, of which defendants had notice, afterwards entered into a sub-contract with defendants, whereby defendants agreed to furnish plaintiff with a certain quantity of ties at elevenpence per tie. In an action for breach of such sub-contract:

Held, that the measure of damages was the difference in value upon each tie between what plaintiff was to pay defendants, and what he was to receive from S. & Co.

Writ issued 24th August, 1854.

DECLARATION.—First count states that on the 7th January, 1854, the plaintiff contracted with Sykes De Bergue & Co., to deliver along the line of the Brockville and Ottawa Railway 120,000 railway ties, of which defendants had notice;

that afterwards an agreement was made between the plaintiff and defendants, for defendants to deliver along the line of said railway 75,504 ties, nine feet in length, and flatted on two opposite sides, &c.; to be made of tamarac, oak, elm, ash, or hemlock, &c.; to be delivered 2112 every mile, between Irish Creek and Carleton Place, and between Smith's Falls and Perth, at the places where the line of railway intersected the concession lines, or at such convenient places as the engineer or agent might point out, &c.; to be delivered before the first of May, 1854; elevenpence to be paid for each tie delivered, in monthly payments, plaintiff to hold twenty per cent. in reserve. In default of performance, plaintiff to be at liberty to take the work into his own hands, &c.; disputes to be decided by engineer or agent, or, at plaintiff's option, by arbitration.

Plaintiff avers his readiness, &c., and assigns for breach that defendants did not deliver the said ties, whereby plaintiff was unable to keep his contract with Sykes & Co., and whereby an action accrued against him, and he sustained other damage and loss.

Second count,—similar, setting out the agreement in form.

Third count,—similar, and denying the delivery of the ties.

Pleas to each count separately :—*Non est factum*—fraud—and performance.

At the trial, it appeared that the railway company had advertised for tenders for ties, and that on the 28th December, 1853, plaintiff addressed a letter to R. Harvey, secretary of the Brockville and Ottawa Railway, Brockville, stating that his tender thereto annexed, to furnish all the ties required for the Brockville and Ottawa Railway, from Brockville to Carleton Place having been accepted, he thereby bound himself, his heirs and executors to Messrs. Sykes, De Bergue & Co., that he would execute the contract, when drawn up by their solicitor, and also procure the signatures of George Crawford, Esq., and of Messrs. Coleman & Co., as his sureties for the due fulfilment of said contract.

The tender was as follows :

“Tenders for ties required by the Brockville and Ottawa

Railway Company on the improved plan. I will furnish the whole of the ties required by the Brockville and Ottawa Railway Company, being those advertised for, and forty thousand additional, at the rate of one shilling and two-pence per tie: less on the whole amount five pounds. Sureties, George Crawford, Esq., and R. Coleman & Co.

Signed by the plaintiff.

“To Robert Harvey, Esq., Secretary of the Brockville and Ottawa Railway Company, Brockville.

“Brockville, 27th December, 1853.”

On the 7th January, 1854, the agreement declared on was executed between the plaintiff and defendants.

On the 6th of February, 1854, a formal contract under seal was executed, between the plaintiff and Sykes & Co., to deliver one hundred and twenty thousand ties by the 1st July, 1854, at one shilling and two-pence each tie. Monthly payments from the first of March, 1854, retaining twenty per cent. until it equalled one-tenth of the price of the whole, &c.

The defendants failed entirely in delivering ties to plaintiff; but afterwards, repudiating the contract with plaintiff, delivered a like quantity to Sykes & Co., at one shilling and two-pence per tie.

On the 3rd of May, 1854, plaintiff served a written notice on defendants, demanding performance.

The defence of fraud failed, and the case at the end turned upon the rule by which the plaintiff was entitled to damages.

In mitigation thereof, it was urged that Sykes & Co. had failed in business, and had not paid the defendant Bates for what he had delivered, and could not have paid the plaintiff had the ties been delivered by Bates to plaintiff, and by him to Sykes & Co.

On the other hand the plaintiff claimed the difference between the two contracts, being three-pence on each tie. The defendants contended against that, and that at all events the plaintiff was only entitled to the difference in value between the contract price of eleven-pence and the market or real value of the ties, at the time appointed for their delivery, if more than eleven-pence, and that it was not shown that such

value exceeded eleven-pence, or equalled one shilling and two-pence.

The jury found for the plaintiff, with £400 damages.

During this term, *Sherwood*, for defendants, obtained a rule on plaintiff to set aside such verdict, on the grounds of—First, misdirection. Second, variance between the contract proved and that stated in the inducement, (that is, between plaintiff and Sykes & Co.) Third, that the contract as stated afforded no data as to damages. Fourth, no proof of market value. Fifth, or of loss or damage to plaintiff. Sixth, that Sykes & Co.'s failure and its consequences was evidence in mitigation of damage. Seventh, that the difference between eleven-pence and the actual value at the day was the only and highest test plaintiff could be entitled to.

A. Richards shewed cause during the same term.

RICHARDS, J., delivered the judgment of the Court:

The question to be considered is, did the learned Chief Justice of this court misdirect the jury in telling them that the measure of the plaintiff's damage was the difference between what he was to pay the defendant Bates for the ties and the price Messrs. Sykes, DeBergue & Co. had agreed to pay the plaintiff for the same ties. The agreement between the parties having been entered into after the proposal of the plaintiff to furnish the ties to Sykes, DeBergue & Co. had been accepted, and for the purpose of carrying out the arrangement made with them (although the agreement between the plaintiff and Sykes, DeBergue & Co. was not actually signed at the time the contract declared upon was, it was afterwards, according to the previous proposal and tender) and the defendants undoubtedly knew the ties were to be furnished to the plaintiff to enable him to carry out that agreement with Sykes, DeBergue & Co. The question then is, was the difference between what the plaintiff was to receive for the ties, and what the defendant Bates was to get for them, the fair measure of damages which flowed from the breach of the defendants' contract. It appears to me it was.

It is stated as a general rule, that profits that may be made on the article contracted to be delivered are too remote

to be considered as damages for a breach of the contract—that the rule is, what is the market value of the article at the time it is to be delivered? or, if it has no market value, then what will it cost to produce it, and what is the price at which the defendant was to furnish it? and the difference between those prices is the measure of damages. This however, seems to me to be subject to be controlled by the circumstances and nature of the contract itself.

It is laid down in Sedgwick on Damages, p. 64: “It is sometimes said in regard to contracts, that the defendants shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated as likely to result from the nature of the agreement; thus—Pothier puts the case of an agreement for the sale of a horse and failure to deliver. If in this instance horses have risen in price, the purchaser has a claim for what he has been obliged to give for a similar animal over and above the price at which he was to have that of the seller, and this he terms the damages *propter rem ipsam non habitam*.

But on the other hand, if the purchaser were a *canon* of the church, and by reason of the non-delivery of the horse could not arrive at his residence in season to receive his *gros fruits* (or tithes,) the seller is not liable for the loss of those *gros fruits*, because this was not foreseen at the time of the contract. But if the horse had been sold for the express object of enabling the *canon* to arrive in time for his *gros fruits*, then the injuries which would be remote and consequential become direct and immediate, and constitute a valid claim, as forming part of the contract between the parties.

In the very recent case of *Hadley v. Baxendale* (9 Ex. 341), which was argued at great length, and was no doubt well considered, *Parke*, Baron, observes, the sensible rule appears to be that which has been laid down in France, and which is declared in their code (Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151), and which is thus translated in Sedgwick (p. 67): “The damages due to the creditor consist in general of the loss that he has sustained and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained, The debtor is only

liable for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in case of the non-performance of the contract resulting from the fraud of the debtor the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring as directly and immediately results from the non-performance of the contract." In argument, the following proposition was laid down: "When the contracting party is shown to be acquainted with all the consequences that must of necessity follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences." Baron *Alderson*, in giving the judgment of the court, lays down the rule thus:

"When two parties have made a contract, which one of them has broken, the damages which the other party ought to recover in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i.e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract;" and in referring to the case then under consideration, he says—"It follows therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of

such cases occurring under ordinary circumstances, nor were the special circumstances which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

In *Robinson v. Harman* (1 Ex. 854) *Parke*, Baron, states the rule of the common law is, "that where a party sustains a loss by breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

The case of *Waters v. Towers* (8 Ex. 401) is strongly in the plaintiff's favor. The facts are briefly referred to in the case of *Hadley v. Baxendale* (9 Ex. 341), above quoted from, as follows: "The defendants there had agreed to put up plaintiff's mill within a reasonable time, but had not completed their contract within such time, and it was held that the plaintiffs were entitled to recover by way of damages the loss of profits upon a contract they had entered into with third parties and which they were unable to fulfil by reason of the defendants' breach of contract.

Now in this case the defendants well knew plaintiff had entered into an agreement with Sykes, DeBergue & Co. to furnish these ties; and the damages which would naturally flow from a breach of the defendants' agreement with plaintiff would be the difference in the price which the plaintiff was to give and receive for those ties, under the contracts referred to. The direction to the jury that this difference was the plaintiff's proper measure of damage was correct in principle, and is sustained by English authorities.

The note to the case in the American edition of eight *Exchequer Reports*, shews that in some of the courts in the United States the profits which might have arisen by a subsequent resale of any property which was to have been delivered under a contract, and which were lost by the non-performance of the contract, cannot be taken into consideration in an action for a breach of such contract, such damages being considered too contingent and remote to be allowed. Of course, without reference to the cases themselves, we cannot see how far they conflict with the doctrine laid down in the more recent English cases.

On the whole, therefore, I think the verdict in the case against *Bates et al.* must stand, as the amount is clearly

below what the jury would be warranted in giving the plaintiff under the rule laid down. The fact that the defendant Bates sold the ties to Sykes, DeBergue & Co. at the price which they had agreed to give the plaintiff for them was evidence to go to the jury of the market value of the ties, and also to shew that defendants' omission to perform the contract may come under the rule where the failure to perform the contract is the result of the fraud of the debtor.

In the case of the same plaintiffs against Bates and Simpson, where the damages were only £12 10s. 0d.—whereas if the jury had followed the direction of the learned Chief Justice the amount would have been a very much larger sum—the plaintiff has moved for a new trial on the ground of smallness of damages. It is said not to be usual to grant new trials for smallness of damages, unless there has been some mistake in a point of law on the part of the judge who presided, or in the calculation of figures by the jury. It is not pretended there was any misdirection, and the amount of the verdict shews clearly that the jury really only intended to give but little more than nominal damages, so that there was no mistake in the calculation of figures. The jury probably considered the action to come under that class called hand actions.

Whatever amount of damages the jury should give to plaintiff must undoubtedly be considered in the nature of *profits*, to be made by plaintiff on the purchase of ties, and on that point a recent and able commentator on the French code holds this language:—

“There is nothing more abstract than the subject of *damages*. The law, therefore, has only been able to lay down general principles, leaving the wisdom of the tribunals to apply them according to the circumstances and facts of the case; and though it establishes that, in general, damages consist of the loss which the creditor has suffered, and the *profit* of which he has been deprived, nevertheless the judge should be more moderate in granting large damages for *profits prevented*, than for loss actually sustained. The *lucrum cessans* is generally less calculated to excite the solicitude of the judge than the *damnum emergens*, and too much vigor on this branch of the subject would degenerate into injustice, *summum jus summa injuria*—such is the general opinion of our authors.”—Sedgwick, 68, 69.

On the whole, then, as the learned Chief Justice, who tried this cause, is satisfied with the verdict, and the plaintiff recovered substantial damages in the other action tried at the same assizes, I think the rule ought to be discharged.

Per Cur.—Rules discharged.

DALY v. LEAMY.

Record—When evidence.

In an action for malicious arrest the plaintiff attempted to put in evidence the original record in the suit of the present defendant against the present plaintiff, with the verdict of the jury in this plaintiff's favour endorsed thereon.

Held, that such record was inadmissible in evidence.

This is an action on the case for malicious arrest.

The declaration containing one count only, alleging the want of any reasonable or probable cause for the defendant believing plaintiff was about to leave the province, with intent to defraud &c. Before the cause was tried the original suit of defendant v. plaintiff was tried at the same assizes, and a verdict rendered for the defendant—that is, the present plaintiff—and on this trial of the cause the present plaintiff gave in evidence the *Nisi Prius* record in that case, with the verdict endorsed in aid of this action, as evidence to support the allegation of malice, and to shew the want of any reason to apprehend that the plaintiff was about to abscond to defraud defendant of a debt when no debt was due. This evidence was objected to, but received, and the jury found for the plaintiff £150.

Last Michaelmas Term defendant obtained a rule on plaintiff to shew cause why it should not be set aside. In the following term (Hilary Term, 18 Vic. 1855) *A. Crooks* shewed cause; and *Wilson, Q. C.*, replied.

MACAULAY, C. J., delivered the judgment of the court.

The objection to the evidence is, that the present action was brought pending the other suit, and in this declaration the debt sworn is not denied, but in effect admitted. To have made the want of any existing debt a ground of action, plaintiff should have waited until that suit was at an end; but he did not do so, nor did the verdict shew it to be at an end.

The plaintiff could not, before the trial of that cause, have gone into evidence on the trial of this cause to shew the non-existence of the debt sworn to; and if not much less, is the verdict therein (which is merely the expression of the opinion of another jury, on evidence not before the jury in this case) admissible.

The debt not being contested or put in issue in the declaration as a ground of action or otherwise, but left uncontradicted, the plaintiff cannot, to shew malice, or to rebut a fraudulent design on his part to abscond or to enhance damages, produce the *Nisi Prius* record. Consistently therewith, and with the verdict for defendant therein, the present defendant may have had reasonable and probable cause for swearing to the debt, and if so, no action would lie as for a malicious arrest on that ground.

The arrest without reasonable or probable cause in relation to the alleged intention to abscond, and maliciously, constitutes the gist of this action, and the verdict in the other suit is not relevant or admissible in evidence in support of this action; but it may have influenced the jury, and materially increased the damages.

If admissible at all, the suit should first be at an end, which it was not; and my impression is, that even if at an end at the time of the trial the result would not be admissible to shew that defendant had not reasonable or probable cause to apprehend that defendant was about to abscond to defraud him of a debt, the existence of which he had not reasonable or probable cause for swearing to.

I think we have no alternative but to set aside the verdict and grant a new trial without costs.

On reference to the learned judges's notes, I find no notice taken of the *Nisi Prius* record in the other suit, but the merits of the accounts were a good deal gone into in the course of the trial, and though objected to apparently during the progress of the cause, and certainly at its close, the evidence was received and retained; so that irrespective of the verdict in the other suit, inadmissible evidence seems to have been received. It is for the defendant to consider what is to be gained by this rule. Now that the other suit,

shewing nothing to have been due, is at an end, it is for him to consider whether the plaintiff can be allowed to add another count to this declaration, or whether, in order to proceed upon both grounds—i.e., because no debt was due, and because defendant had no reason to apprehend &c., he must discontinue this action and begin *de novo*.

Per Cur.—Rule absolute.

WILSON V. AITKIN.

Lex loci contractus—Promissory notes.

A promissory note made in Upper Canada, for a sum of money expressed to be sterling, payable in Glasgow, not adding the words, *and not otherwise payable elsewhere*, is a note payable generally, and that the plaintiff was not entitled to recover the difference of exchange on such note.

In two cases, Mr. *Freeman* moved on leave reserved to increase the verdict. The actions are brought by the holders against the maker of promissory notes made in Upper Canada, for certain sums of money expressed to be sterling, payable at the office of the payees in Glasgow, not adding the words "and not otherwise or elsewhere;" and the question is, whether sterling money is to be calculated according to the statutes 4 & 5 Vic. chap. 93, sec. 3; and 16 Vic. chap. 168, sec. 5, at £1 4s. 4d. currency to the pound sterling, or whether the difference of exchange exceeding that sum (as it does in fact) can be added, so as to enable the plaintiff to purchase bills and remit the amount to Glasgow, where the notes are made payable.

MACAULAY, C. J., delivered the judgment of the court:

It does not appear that the notes were in fact presented there for payment or protested there for non-payment.

On reference to the P. S. 7 W. IV. ch. 5, and 12 V. ch. 76. s. 2; and the cases of *Rothschild v. Currie* (1 Q. B. 43); *Allen v. Kemble* (13 Jur. 287); *Gibbs v. Fremont* (17 Jur. 826, S. C. 20 Eng. R. 555); and *Story on Bills*, s. 177, it appears to me that by our law, or the *lex loci contractus*, the notes are payable generally, and that the plaintiff is only entitled to recover at the rate of £1 4s. 4d. to the pound sterling. See *Ross et al. v. Winans & Poore* (5 U. C. C. P. R. 166.)

Judgment accordingly.

DOUGLASS AND ALBRECHT V. MAYER.

Cognovit—Impediment of.

In an action on the case to set aside a security, under which plaintiff claims, or a portion of the sum confessed, the plaintiff in the confession may shew in support of it the circumstances that constituted the consideration for the acknowledgment, and that such confession was to operate as a continuing security, to cover future as well as past advances.

CASE. First count abandoned at the trial. Second count recites, that being indebted to the defendant—to wit, in £316 14s. 4d.—it was agreed plaintiffs should give a confession of judgment for a nominal sum of £600 to secure the aforesaid sum, on the defendant's agreeing that any execution issued thereon should be endorsed only for so much thereof and interest as might remain due; the judgment to be security for the said £316 14s. 4d.

That in pursuance, &c., the plaintiffs did, on the 30th of September, 1854, sign a confession of judgment in the Queen's Bench, confessing nominal damages of £1000 and costs, with leave to enter up judgment forthwith, but no execution to issue till the 4th of October next following, in default of payment of £600 and interest; and that the defendant afterwards entered up judgment thereon; that the plaintiffs had paid £132 of the said £316 14s. 4d., leaving £184 14s. 4d. only due; yet the defendant wrongfully and maliciously caused a *Fi. Fa.* to be issued on said judgment, &c., and endorsed for £446 16s. 10d. damages, £8 9s. 8d. costs and interest, and 17s. 6d. for writ, and caused the plaintiff's goods to be seized by the sheriff of York and Peel for the same, whereas £184 14s. 4d. only remained due, &c.

Pleas: First—Not guilty. Second—Denial of agreement. Third—That the plaintiff did not sign the confession. Fourth—That the full amount endorsed on the writ was due; *absque hoc*, that £184 14s. 4d. only, or any less sum than the amount endorsed, remained due and owing, &c.

The plaintiffs proved a confession as stated, taken through the intervention of J. Crawford, Esq., the plaintiffs' attorney. It calls the £600 the true debt in the action.

It appeared at the trial that £600 was not all due when confessed; and that of the amount then due £184 14s. 4d. only remained due when execution issued at the time alleged,

but that £446 16s. 10d. was due, including subsequent advances of goods, and that the £600 was confessed as the true debt to cover future as well as past advances; in short, to be a continuing security. Verdict for defendant.

H. Cameron obtained a rule *Nisi* to set the verdict aside, as being contrary to law and evidence. *Hagarty, Q. C.*, shewed cause.

MACAULAY, C. J., delivered the judgment of the court.

The facts then shew, not that the £600, or the confession to that extent, was to operate as a continuing security, but rather that it was to operate as a security to the extent of £600, including past and future advances; and that the execution was not really endorsed for more than the balance due, such balance being composed partly of both. Under such circumstances, I do not think the verdict should be disturbed. The satisfaction piece is satisfactorily explained—*Dillon v. Browne*, 6 Mod. 14; *Hatton v. Young*, 2 W. B. 948; *Charrington v. Laing*, 6 Bing. 242; *Wooley v. Jennings*, 5 B. & C. 165; *Saltmarshe v. Hewett*, 1 A. & E. 812; *Re Brown*, 2 Grant Chy. Cases 111; *Shaw v. Vaudnzen*, 5 U. C. Q. B. R. 353.

The amount confessed, as compared with the debt really due, and the short interval between the confession and the time when execution might issue, tend strongly to the inference that it was meant to operate as a security to the extent of £600.

The second count does not impeach the confession on the ground of fraud, but of excess. Then *prima facie* it admits £600 to have been the true debt; and if so, there was no excess. But the plaintiffs seek to contradict it by parol, and to prove that the true existing debt was less, and that subsequent payments had reduced it to £184 when the execution issued. This is objected to as contradicting and varying the instrument without imputing fraud. (Part of it may have been a gratuity).

The defendant admits that if the confession cannot be contradicted he is protected; and if it can be, that on the same principle he may rebut the parol evidence by other parol evidence, proving that the £600 was inserted to operate as a security for future as well as past advances, not as a continuing

security, but as a security for any advances not exceeding £600: and if so, that he is equally protected. This seems reasonable. The consideration for confessing a sum due by a confession of judgment, like the consideration for a sum promised to be paid by a note of hand, may, I dare say, be investigated when necessary to the ends of justice, as both resting in parol contract. But, admitting this when the object is to defeat or set aside the security, or a portion of the sum confessed, I think the plaintiff in the confession may shew in support of it all the circumstances that really constituted the inducement or consideration for the acknowledgment, such as an existing debt and further advances contemplated and made, and the balance really due when the execution issued.

Per Cur.—Rule discharged.

COMMON PLEAS, HILARY TERM, 19 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.,
 “ A. MCLEAN, J.,
 “ W. B. RICHARDS, J.

RUTTAN V. WINANS.

Easement—Prescriptive right to.

Defendant, and those under whom he claimed, having the right to overflow the adjoining lands to an extent not exceeding ten acres, for supplying their mill with water, and which right had been exercised to a certain extent for twenty years or more,

In trespass *quare clausum fregit* for entering the adjoining close—*Held*, that having the right to overflow a part of plaintiff's close, defendant had, as incident to that right, authority to enter and repair breaches in the natural state of the soil of the dam, but not to add thereto so as to cause additional overflow.

Held, also, that the extent to which such right could be maintained was that to which it was exercised during twenty years after such right accrued; and that a partial overflowing would not keep alive the right to extend the overflow at any time to the full extent of ten acres.

Declaration states that the defendant, on—to wit, the 1st of June, 1853,—with force and arms, broke and entered a

close of the plaintiff's, being lot No. 19 in broken concession A. in the township of Hamilton, and then and there put and placed an embankment or dam and large quantities of wood, dirt and stone in and upon the said close, and kept and continued the said embankment or dam, wood, dirt and stone so there put and placed, without the leave or license and against the will of the said plaintiff, for a long time—to wit, from the time of putting and placing the same as aforesaid until the commencement of this suit, and thereby greatly incumbered and prevented the plaintiff's enjoyment of the said close; and other wrongs, &c., to the plaintiff's damage of £500.

Pleas.—First. As to so much of the declaration as relates to the breaking and entering that part of the said close, which may be known as follows: commencing on the limit between lots Nos. 19 and 20, where it intersects the south-east line of the timbers of the old dam occupied by the defendant; then N. $36^{\circ} 30'$ E., following the line of the timbers of the said old dam 5 c. 18 l.; then N. 4° E. 1 c. 90 l.; then N. $72^{\circ} 30'$ W. 3 c. 7 l.; then N. 16° E. 1 c. 10 l.; then N. 21° W. 2 c. 91 l.; then N. 7° W. 4 c. 73 l.; then N. $15^{\circ} 30'$ W. 1 c. 70 l.; then N. 49° W. 1 c. 7 l.; then N. 37° W. 90 l.; then N. 40° W. 1 c. 57 l.; then S. 65° W. 90 l.; then N. $46^{\circ} 45'$ W. 1 c. 44 l. to a fence; then S. $54^{\circ} 45'$ W. 1 c. 61 l. to the division line between the lots Nos. 19 and 20 aforesaid; then southerly along the said division line 20 c. 90 l. more or less to the place of beginning, and the putting, placing, keeping and continuing, &c.—Not Guilty.

Second. As to so much of the first count as relates to the breaking and entering that part of the said close described in the last plea, and the putting, placing, keeping and continuing, &c., that the part of the said close in which, &c., so described at the said time when, &c., was not the plaintiff's close, &c.—To the country, &c.

Third. As to so much of the same close above described, &c., that Patrick Wallace before the said time when, &c.—to wit, on the 1st of January, 1850,—was seised in fee of that part of the said close above described; and being so seised, &c., by an indenture made between him of the first part and Stewart Easton McKechnie, said Wallace demised unto said

McKechnie that part of the said close, to hold from the 1st of January, 1850, for 999 years thence next ensuing; by virtue of which demise said McKechnie entered and was possessed of said term; and afterwards by indenture—to wit, on the 1st of May, 1853,—assigned the same to William Butler for the residue of the said term; and afterwards—to wit, on the 2nd of May, 1853,—said Butler assigned said residue of said term to said McKechnie and defendant, who entered and became possessed for the residue of the said term; and plaintiff claiming that part of the said close by color of a charter of demise to him thereof pretended to be made for life by said Wallace before the said demise to said McKechnie (whereas nothing passed by the said charter), before the said time when, &c., entered into and upon that part of the said close; in which, &c., and thereupon defendant afterwards, at the said time, when, &c., entered into and upon that part of the said close and in and upon the plaintiff's possession thereof, and committed the trespasses in the introductory part of the plea mentioned.

Fourth plea. As to so much of the declaration as relates to that part of the close described in the first plea, &c., (enumerating the alleged trespasses), that for the full period of twenty years next before this suit the occupiers *pro tem.* of lot No. 20 in broken concession A. in the township of Hamilton, being the lot adjoining the said close in the first count mentioned, had actually used and enjoyed, and were accustomed to use and enjoy as of right and without interruption, the right to build, erect, put up, repair and maintain a dam across a stream (running and flowing through the said several lots, and extending from a certain point in the said lot No. 20 into, upon and to a certain point in that part of the said close in which, &c., before described) at all seasons of the year, and at all times into and upon that part of the said close in which, &c., at all times as necessity required, to put up and maintain the embankment, &c.; that during part of the said twenty years he occupied the said lot No. 20, and having occasion, &c., he did at the time when, &c., commit the trespasses in this plea mentioned, doing no unnecessary damage.

Fifth. As to the residue of the trespasses and causes of

action in the declaration mentioned, defendant brings into court £3, &c., denying further damage in respect thereof.

Replication—To the first and second pleas: Similiter.

To third plea: That said Patrick Wallace was not seized in fee of that part of the said close in which, &c., *modo et forma*, &c.

To fourth plea: That plaintiff commenced his action, not for the trespasses in that plea mentioned, &c., but for that defendant at the said time when, &c., *vi et armis*, broke and entered the said close of plaintiff, and then and there put and placed thereon a dam or embankment, &c., wood, dirt and stone, &c., other and different from the dam, wood dirt and stone in said plea referred to, which newly-assigned trespasses are other and different than those mentioned in said fourth plea: verification.

To fifth plea: Plaintiff accepts the said sum of money in satisfaction of the residue of the said trespasses in the declaration mentioned; therefore as to such residue the defendant is acquitted, &c.

Rejoinder to replication to third plea. Similiter.

To new assignment: First—Not guilty.

Second: That part of the said close in which, &c., at the said time when, &c., was not the close of plaintiff.

Third: As to the trespasses newly-assigned, that for the full period of twenty years next before this suit the occupiers *pro tem.* of lot No. 20, &c., being the lot adjoining said close in the declaration mentioned, had actually used and enjoyed, &c., as of right and without interruption, the right to overflow a portion of the said close in which, &c., not exceeding ten acres, for the supply of a mill-pond with water, which mill-pond had been all that time used by the said occupants for useful purposes; and the same had during all that time been kept up and maintained upon and across a stream (running through the said several lots), and extending from a certain point in said lot No. 20, into, upon and to a point in that part of said close in which, &c., in said fourth plea described; and that during part of the said twenty years—to wit, at the said time when, &c.—defendant was occupier of said lot No. 20, and of the said mill-pond; and because the ground

at a certain point in the said close in which, &c., having been worn away by freshets and the action of the waters of said stream when it overflowed its usual and natural limits, it became necessary in order to enjoy the right to overflow a portion not exceeding ten acres of said close, in which, &c., to put, place and lay, within the usual watermark of said pond, and within that part of the said close so described in the said first plea, the same not exceeding ten acres, a dam or embankment, and wood, dirt and stone, to prevent the escape of the water from the said pond, and to prevent injury to proprietors on each side of said stream below said mill-pond; and that having occasion to use the said mill-pond, and to overflow thereby part of the said close in which, &c., described as aforesaid, the same not exceeding ten acres, defendant did necessarily, &c., commit the said trespasses newly-assigned, as he lawfully might, &c.: verification.

Replication to pleas to new assignment. To first and second pleas: Similiter. To third plea: *De injuriâ*, to the country and issue.

It is not quite clear on these pleadings, whether the plaintiff means to new assign other trespasses to the close mentioned in the declaration beyond the limits of that part of it which is described in the defendant's first plea and referred to in the subsequent pleas, or to other and different trespasses within the limits of that part of the close described in the defendant's pleas. The plea to the new assignment, though not very distinctly, seems to limit the prescriptive right pleaded to that part of the close which is described in the first and referred to in the fourth pleas, as if the new assignment was for different and other trespasses within the limits of that part of the close in which, &c., so described. Both parties seem agreed to this, and that the object was to put in issue the merits, and to raise the question whether defendant could establish a prescriptive right to do what he had done upon that part of the plaintiff's close of which he complains, and which in fact is within the limits described in the fourth plea. All beyond those limits is covered by the fifth plea, and satisfied by payment of money into court, and accepted by the plaintiff.

It appeared in evidence that lot No. 19 was granted to Elias Jones, who by indenture of bargain and sale the 9th of June, 1819, among other lands, conveyed to Lawrence Herchmer lot No. 19 in front of the 1st concession, township of Hamilton, described as commencing in front at the S. E. angle of said lot No. 19 in the broken front upon lake Ontario; then N. 16° W. 121 c. more or less to the front line of 1st concession; then S. 74° W. 20 c.; then S. 16° East to lake Ontario, and then easterly along the water's edge to the place of beginning, 235 acres, more or less; *Habendum* in fee: "Subject to a certain *agreement*, made by the said Elias Jones, *whereby permission is granted* to the proprietors of a certain mill, situate on the east half of lot No. 20 in front of the first concession of the said township of Hamilton, to *overflow a certain portion* of lot No. 19 in front of the first concession of the said township of Hamilton, as hereinbefore described, *not to exceed ten acres, should the same be necessary* for the *maintenance of the said mill in water.*" Registered the 7th of July, 1819. That the plaintiff became entitled to the said lot from Herchmer, and has possessed it many years; that there was a mill and dam on lot No. 20 as far back as 1817, a part of which was then on lot No. 19, though it caused a little back-water upon lot No. 19 higher up the stream, such mill and dam being at and across a stream of water running into lake Ontario, and situated near the mouth of such stream: that the stream was chiefly upon lot No. 20, and the mill near the line between lots Nos. 19 and 20; that latterly there is more water on lot No. 19 than of old; that lot No. 20 belonged to Alexander Macdonald, who sold it to Robert Henry in 1817, at which time there was a mill upon it, and Jones lived upon lot No. 19; that the privilege to extend the dam and back-water upon lot No. 19 was under some agreement between Henry and Jones, after Henry became possessed of lot No. 20; that Henry increased the dam, and built it partly upon No. 19, soon after he became owner of No. 20; that a wing-dam has been more recently erected on No. 19, which has given rise to this action; Henry being aged and infirm (76 years old), was examined on interrogatories at his house, at Cobourg; and in his answers stated, that he came to

Cobourg in 1817, at which time plaintiff resided in Haldimand, and afterwards upon the lot No. 19 now in question: that No. 20 belonged to Henry from 1817 to 1831; and that when he first knew the premises there was an old dam, mill and pond: that he purchased No. 20 from Macdonald, and sold the premises to George Ham, having previously built a new mill, mill-dam, and wing-dam, and overflowed about eight or nine acres of lot No. 19, which were needed soon after he purchased lot No. 20: that, requiring to overflow eight or nine acres of lot No. 19, he arranged with Jones, the owner of it, for the purchase of ten acres, and afterwards paid him therefor; and that Jones acknowledged the receipt of the money in a current account between them, made in his own handwriting, *i. e.*, Jones's, and produced. It is headed, "Messrs. Henry and Bethune with Elias Jones, balance on settlement, £1 17s. 7d." Then follow various small items, commencing the 18th of February, 1819, and running on to the 16th of August; the last item being land for mill-pond £50, E. E., 1st of January, 1820, signed Elias Jones. Below, on the same half sheet of paper, is a further account from the 20th of January, 1820, to the 20th of January, 1821, £3 17s. 6d., E. E., 1st of March, 1821, signed Elias Jones; but no receipt appears.—That the part so purchased was shewn on a plan of lot No. 20, made by Birdsall, a surveyor, which is referred to; it is dated the 5th of June, 1820, and purports to be a plan of the survey of lot No. 20. It represents lot No. 20 lying west of No. 19, and the line or course of the stream in question running from lot No. 20 in its southerly course to the lake, and touching lot No. 19; then returning upon lot No. 20 and again crossing the division line between lots Nos. 19 and 20, and so continuing until it came to the mill-pond, which is represented as partly upon lot No. 20, and partly upon lot No. 19, and about or nearly five chains on lot No. 19, to embrace such pond. A part of lot No. 19 is laid off at right angles to the dividing line on the south side about thirty-two chains from the lake; then east nearly five chains; then north about twenty chains; then west about five chains, whence to the place of beginning, running down the pond, would be about twenty chains, indicating a tract of

five chains by twenty, or about ten acres. These outlines include more of lot No. 19 than is covered by the pond as laid down on the plan. The mill works are all represented as upon lot No. 20. Henry said he paid Jones the £50, and took no other writing from him; but that in Jones's deed to Herchmer the right was reserved, and that he Henry took possession of the reserved portion from the year 1818: that he used and occupied about three-quarters of an acre on lot No. 19, between the dam and the road running east and west, south of the dam, with Jones's, and afterwards with Herchmer's consent, and continued to do so till he sold the property. The road alluded to is laid down on the plan as the York road, crossing the water-course below the mill and dam, and then running up north through lot No. 20; the three-quarters of an acre mentioned seems to be that which lies south of the south line that defines the ten acres. That he Henry built the wing-dam in 1820 on lot No. 19, represented as extending the pond on the south-east end of it upon lot No. 19, but within the right lines marking the ten acres: that from the line of this wing-dam (which was built of frame work) he carried a mud-dam, thirty or forty feet long, in a more northerly direction, to prevent the water washing round in freshets: that in 1818 he built a temporary wing-dam above where the present wing-dam stands, and planked it with plank of the old dam, and banked it with earth which he took off lot No. 19 with Jones's consent: that the main dam was on lot No. 20, and the wing-dam on lot No. 19, as indicated on the plan referred to: that he used as much of the lot No. 19 as his dam and embankment overflowed (whatever it was) from the spring of 1818 to July 1831; he thought eight or nine acres; but the high-water-mark never extended beyond the limit of the ten acres: that plaintiff bought lot No. 19 in 1832: that the old dam gave five or six feet fall, with an under-shot wheel: that it was on the same site as the present, and the east end went to within a few feet of lot No. 19; and that the dam he afterwards built went further. In another place, he said the main dam had between ten and eleven feet fall, including apparently the wing-dam on lot No. 19; and that he repaired the dam whenever and as required, during

his occupation : that plaintiff did not complain till, he thought, more than twenty years after he erected the wing-dam on lot No. 19, when he said he did not think Henry had any right to have done it, but which Henry asserted his right to do. He said that some years after he had purchased from Macdonald he (Macdonald) gave him (Henry) a bond or agreement in writing under seal from Jones and wife, securing to the first purchaser of lot No. 20 as much of lot No. 19 as was necessary for the mill and dam ; but he was not aware of it when he purchased the ten acres of Jones (said bond not produced, but said to be lost or mislaid), to whom he paid £50, and was promised a conveyance when the title was cleared of embarrassment, but never got one : that he built a mud-dam or embankment to the east end of the wing-dam of thirty or forty feet, to prevent the water washing round in freshets, &c. He further stated, that he sold and conveyed to Ham and conferred upon him the rights and privileges which the conveyance gave, and intending to include the right to ten acres of lot No. 19 ; but the deed is not before the court. He also stated in explicit terms that he had extended the wing-dam and mud-dam upon lot No. 19 early in his own time, and disposed of the property thirteen years afterwards to Ham, in 1832. He admitted the plaintiff afterwards conversing with him on the subject, but thought he was satisfied the wing-dam, &c., was duly authorized : so the contest seems to be, whether within twenty years the owners of the mill have encroached upon lot No. 19 by what is called the mud-dam, though within the limits of the ten acres promised or reserved, or granted by Jones.

The plaintiff called several witnesses to prove that the embankment beyond the wing-dam (running east and north of it) had been extended northerly within a few years past, to prevent the escape of the water round the east end of the wing-dam, as it was before at high or flood water ; and that the height of water had been raised in the dam : not attributed to the extension of the embankment or new wing-dam, as it was called, but to a piece of timber being laid across the dam, which raised it seven inches.

The defendant's witnesses alleged the extension of the new

wing-dam northerly, within a few years, but upon the water-line of the pond, and not further east than the ten acres would admit. Surveyor Roach proved another plan prepared by him, shewing in red lines the outline of the ten acres as he represents. He said the quantity of lot No. 19 actually covered by the water was eight $\frac{11}{100}$ acres; and that the wing-dam was within the ten acres, which included dry land within the lines laid down. The defendant further endeavored to shew, that the water was not higher than formerly. Roach's plan exhibits the line of the main dam, the main wing-dam and the new or extended wing-dam, and also the water-line caused by the dam within the outlines of the ten acres.

The learned judge asked the jury, first, whether the main wing-dam or embankment was extended within twenty years; that is, beyond what it used to be, in the line of it: second, whether the new wing-dam was built within the water-line of the pond, or encroached upon the dry land of lot No. 19 in *plaintiff's possession*. To the first, the jury said that the dam extended eastwards: to the second, that the dam was constructed outside the water of the pond. On which finding, he directed a verdict for the plaintiff with one shilling damages, with leave for the defendant to move the court to enter it for the defendant, if entitled thereto on the evidence.

In Easter Term, 18 Vic. 1855, *Connor, Q.C.*, obtained a rule on the plaintiff to shew cause why the verdict should not be set aside and entered for the defendant, or a new trial be had, on the ground of misdirection, and as being contrary to law and evidence.

Vankoughnet, Q. C., shewed cause, and contended that it was for the jury, and no misdirection. That the defendant claimed the right to erect the dam, as he had done; and whether he had exceeded within twenty years was a fact respecting which there was conflicting evidence, such excess relating to the main wing-dam and the new one: that he did not plead or rely upon a grant or license from Jones (query, under second plea), but upon twenty years' enjoyment: so that the question was, to what extent he had actually enjoyed for twenty years and more; not whether he had ex-

ceeded the ten acres or not. That the defendant endeavored to shew that the plaintiff was not possessed within the ten acres' line, but the jury found for the plaintiff, and no agreement with Jones was proved. He also relied upon the right derived from Jones being extinct, the mill having been burnt a few years ago, which was proved, though that point was not material in the end: that the land described in the first plea covered more land than the water, as Roach proved; and that plaintiff possessed all not overflowed.

Connor, Q.C., in reply, contended, that the plaintiff had no merits. That on reference to the map (Roach's) it would be seen there was no excess; that Henry acquired ten acres more than twenty years ago; and having entered upon part, was constructively entitled to the whole; and that the plaintiff was not possessed of any part thereof.—*Wood v. Leadbitter*, 13 M. & W. 838. That the true water-line was shewn by the fact that, when the new wing-dam was cut by Roach, the water escaped upon the land outside: that at all events the action should have been case, not trespass. The tract described in the first plea seems to be that laid down in Roach's map in zig-zag red lines, within the red outline of the ten acres.

MACAULAY, C. J., delivered the judgment of the court.

All the defendant's pleas except the last relate to that part of the close which is described in the first plea; to which defendant pleads, first, not guilty; second, not plaintiff's close; third, that Wallace was seised in fee; that he demised to McKechnie for 999 years, who entered and assigned to Butler, who assigned to said McKechnie and defendant, who entered, and, giving color to plaintiff under an invalid charter of demise for life, justifies the trespasses mentioned in that plea; fourth plea, a prescriptive right, by virtue of twenty years' uninterrupted enjoyment. The fifth plea is of payment of £3 into court, in satisfaction of the residue of the trespass in the declaration mentioned, which would of course extend to all or any trespasses beyond the limits defined in the first plea, and might include trespasses committed within those limits not covered by the third or fourth pleas.

In reply, plaintiff takes issue on the first and second pleas. To the third, denies that Wallace was seised in fee in manner and form alleged: concluding to the country, and issue. To the fifth, plaintiff accepts the £3 in satisfaction, and acquits defendant, &c. To the fourth, plaintiff now assigns other and different trespasses, committed in the said close, than those mentioned in the fourth plea; to which defendant pleads a prescriptive right, by reason of twenty years' uninterrupted enjoyment, as of right, &c., to put, place or lay, within the usual water-mark of said pond, and within that part of said close described in the first plea; the same not exceeding ten acres, a dam, &c.; and so justifies. Plaintiff replies *de injurid.*

Though not clearly expressed, I think it must now be taken that the new assignment means other trespasses within the limits stated in the first plea, and that the fifth plea relates only to trespasses beyond those limits; if not, the one is not consistent with the other. In the application of the evidence to the pleadings, it appears that the newly-made embankment, in extension, or to the north and east of the first or earlier embankment made upon plaintiff's lot No. 19, but both being within the limits specified in the first plea, constituted the trespass complained of as newly-assigned. The defendant does not plead title thereto by non-existing grant. But, according to the late decisions, it would be open to him to prove his title under the second plea of not possessed, or not plaintiff's close—*Whittington v. Boxall* (5 Q. B. 139), *Jones v. Chapman* (2 Ex. R. 803). But the evidence does not prove title to the land, or the estate in the land. The account rendered by Jones to Henry, in which he charges £50 for land for mill-pond, would not pass the estate; nor would the exception or mention thereof in Jones's deed to Herchmer have that effect; and Henry says that he did not receive any other grant or conveyance. Of course the bond from Jones to Macdonald, from whom Henry purchased lot No. 20, would not pass the estate. Even if the existence and contents of such instrument appeared more clearly than they do, I see no sufficient ground therefore for holding the defendant, or those deriving title and holding under Henry, seised of an estate in the *locus in quo*. No paper title is traced to the defendant, nor does he justify under any one who had

such a title, even if he could set up the *jus tertii* under the second plea; nor was twenty years' possession shewn, if that would do. It follows, that under the deed from Jones to Herchmer and Herchmer to plaintiff the latter became seised and possessed of the whole of lot No. 19, including the *locus in quo*, subject, however, to an easement subsisting in favor of the owners of lot No. 20 and the mill, to overflow the same to the extent of ten acres. The plaintiff does not, however, deny the right stated to have been acquired in the fourth plea, to some extent; meaning to the extent of the first or original wing-dam erected on lot No. 19 by Henry, and maintained thereon by his successors to the mill: but the plea to the new assignment limits the *locus in quo* to something beyond that, and applies to the recent or new embankment. Then, as to that embankment: Its legality, I think, depends, not on title to the land, for the evidence does not establish that; but upon the consideration whether it was merely a repair, or was in fact an addition, and more than a reparation.

I think that, as against plaintiff (holding as he does under Jones), the mention of the right to overflow is evidence of a grant of such an easement by Jones to the occupants of lot No. 20, but the grant of an easement only. He conveyed to Herchmer, subject to an agreement whereby permission was granted to the proprietors of the mill, &c., to overflow lot No. 19, not exceeding ten acres, should the same be necessary for the maintenance of the mill in water.

I think that, coupled with the other evidence, this may be taken to admit a grant. It says, "whereby permission was granted, and the grant of permission would be a grant of the right or easement. The defendant does not however, in pleading, rely upon the grant of an easement only, or upon a right to enter and repair as incident to such easement. Then, as to the easement itself, it only permitted the overflow, not exceeding ten acres, so far as necessary to maintain the mill in water. That grant existed as far back as 1819, at the latest, and perhaps as far back as 1817, or still earlier; but it contains no permission to erect an embankment or dam upon any part of lot No. 19 in order to cause the overflow of ten acres, or to maintain the mill in water. Henry, however,

construed his right otherwise, and did enter and erect a part of his dam upon lot No. 19; and having maintained it there, and caused back-water thereby upon some other parts of the said lot No. 19 for upwards of twenty years, the right to do so has been acquired by lapse of time and the Statute of Limitations; but only to the extent so enjoyed. On the other hand, though the grant originally authorised the overflow of ten acres (whether by a dam or embankment placed upon lot No. 20 only, or partly upon both lots Nos. 19 and 20), still such right, if not exercised within twenty years, would be lost by lapse of time, as it might have been acquired in the absence of any grant; consequently, the easement must now be limited to the extent overflowed within twenty years from the time of the grant, and cannot be extended. Although the excess does not go beyond ten acres, the lapse of time exceeding twenty years must, I think, be taken conclusively to establish that it was not necessary to overflow more than was overflowed within twenty years to maintain the mill in water; in other words, the defendant cannot now extend his works, or even upon lot No. 20 erect a dam that should cause the overflow of plaintiff's lot to a greater extent than it had been overflowed within twenty years after the right to do so first accrued. I think the right may be lost or abandoned by non-user, or it might be acquired by usage exceeding twenty years.

If it turned upon the exercise of the easement, therefore, the defendant could not, at the time when, &c., overflow for the first time land that had been previously dry; much less could he enter on such dry land to raise for the first time additional embankment or dam to retain the water. At the same time, however, I am of opinion that, having the right to overflow a part of plaintiff's lot, the defendant had, as incident to that right, legal authority to enter upon the plaintiff's close and repair breaches that might have been made in the natural state of the soil. I think he was entitled to repair and preserve the natural state of the soil, so as to keep it in *statu quo*, but not to add to its natural level, so as to cause additional overflow or backwater. If so, then I think defendant does establish under his plea to the new assignment a right

to overflow the plaintiff's close to a certain extent, by reason of twenty years' enjoyment, &c.; and, so far as that overflow extended, he had a right to enter and repair.

The plaintiff does not deny this; but, deeming it as meant to be covered by the fourth plea, he waives that and new assigns additional or other trespasses, which reduces the case to the consideration whether the defendant has done more than repair breaches so as to maintain the soil in that part of plaintiff's close in its natural state, not adding thereto or causing extra overflow of the waters, or has added to or raised the natural level of the soil and placed additional embankments on plaintiff's close, not in necessary repair of breaches in the natural soil, but in order to increase the quantity of the overflow on plaintiff's close; or, at all events, disturbing or incumbering his close beyond the limits, or to an extent not sanctioned by twenty years' previous usage, or necessary to effect repairs. It may be remarked that the plea to the new assignment does not allege that the trespasses complained of were committed within the usual water-mark; but, after alleging the necessity for so doing, he adds, that he did necessarily commit the trespasses newly-assigned, not saying they were the identical or the same.

However, taking the substance of the issue to be, not whether it was within the usual water-mark of the pond, but whether the defendant had acquired the right under the statute, as pleaded, it was for the jury to decide upon the fact whether it was a mere repair required to sustain the pond in the state it had been for twenty years before, or an encroachment or excess beyond what twenty years' enjoyment sanctioned: and they have found for the plaintiff; and the evidence, though conflicting, seems to warrant such finding.

As to the argument that Henry having possessed or overflowed part of the ten acres, was constructively possessed of the whole ten acres, I do not think (for reasons already given) that the facts warrant that view. Neither, on the other hand, do I think that, the original mill having been burnt down and the mill rebuilt, destroyed or abridged or suspended, the rights acquired by the occupants of lot No. 20 to overflow a part of lot No. 19 not exceeding ten acres. But

I think that the extent to which such right can be asserted and maintained depends upon the extent to which it was in fact exercised within twenty years after it accrued, and that a partial exercise of it, as by overflowing eight or nine acres, did not keep alive the right to extend the overflow at any time so as to cover ten acres.

On the whole, I think that as to a portion of the trespasses complained of the defendant was not repairing breaches that he was legally entitled to repair, but did otherwise commit acts of trespass upon plaintiff's close not legalised by twenty years' previous enjoyment, and that the rule should be discharged.—*Smith v. Loyd* (25 Eng. Rep. 492, Exch.); Statute of Limitations.

Per Cur.—Rule discharged.

SPARROW V. CHAMPAGNE.

Ordinance lands—Leaschold lands—Sale of.

In debt on a lease, it was proved the plaintiff held under the last of several assignments of a yearly lease from the principal officers of Her Majesty's ordnance. A judgment was obtained against the plaintiff, and his interest in the lot sold under a writ of *Fi. Fa.* against goods and chattels. Plaintiff afterwards demised the said lot to defendant, and on nonpayment of rent brought his action on the lease.

Held, that the interest of plaintiff was a chattel interest, and might be sold under *Fi. Fa.* against goods and chattels—See 7 Vic. ch. 11, sec. 7; and that the lease to defendant being made after such seizure and sale, plaintiff was not entitled to recover.

Declaration states that on the 3rd of March, 1853, plaintiff demised to defendant a messuage and premises for the term of three years, from 1st of May, 1853, at a yearly rent of £24, payable monthly in advance, in equal proportions; that defendant entered and was possessed from thence until the 30th of June, 1854, when, to wit, £30 for fifteen months' rent ending 31st of July, 1854, became payable, wherefore an action hath accrued, &c.

Pleas—First. Never indebted; to the country, and issue.

Second. That plaintiff did not demise *modo et forma*, &c.; to the country, and issue.

Third. As to £3 for one and a half months' rent, to wit, on the 15th of June, 1853, defendant paid the same to plaintiff, in full satisfaction of so much, &c.—Verification.

Fourth. As to residue, being rent for thirteen and one half

months, that the plaintiff was himself only a tenant for years and until his interest was sold by the sheriff of Carleton, under a writ of *Fi. Fa.* and *Venditioni Exponas* against his goods and chattels, under a judgment recovered by the Bank of Upper Canada, on the 22nd of December, 1851, for £1010 15s. 7d., on promises, in Queen's Bench. The plaintiff's interest in the residue of his said term being sold to Nazarin Germain, who became entitled to the rents from defendant, and hath received the same; without this, that defendant held and enjoyed the said demised premises as tenant to the plaintiff for the residue of the term in the declaration mentioned; to the country, and issue.

Replication—To first, second and fourth pleas—Similiter. To third plea, denies payment.

At the trial, before Macaulay, C. J., at last assizes at Ottawa, the facts appeared to be—an officer from the Ordinance office produced a book belonging to the department, headed K., Sussex street, west side—

<i>John Mulvihill, Dr.</i>				<i>Contra.</i>		<i>Cr.</i>	
1827—Nov. 1.	To ½ yrs. rent	£3	0	0	1828—Jan. 2.	By Cash from T. B.	8 0 0
1828—May 1.	" 1 do	6	0	0	May 28.	do do	3 0 0
1829—May 1.	" 1 do	6	0	0	By balance contra	9 0 0
£15 0 0				£15 0 0			

<i>Paul Lamotte, Dr.</i>				<i>Contra.</i>		<i>Cr.</i>	
1830—To balance per contra	£9	0	0	By Cash of J. N. H.		£6	10 6
1831—" 1 year's rent.	6	0	0	" do from do	not ac-		
1832—" 1 do do	6	0	0	counted for		0	13 6
" 1 do do	6	0	0	1832—May 1. By baln'c due		19	16 0
£27 0 0				£27 0 0			

1832—To balance due per contra.	£19	16	0
1832—To 1 year's rent.	6	0	0

The officer stated as a witness, that the lot K. (which is situated in Lower Bytown, now city of Ottawa,) originally stood in the name of John Mulvihill, the first entry being 1st of November, 1827, and that he was recognized tenant from year to year, and rent is credited; that he is entered as transferring to Paul Lamotte, who is credited with rent also; that the rent has been charged from November, 1827, at £6 13s. 4d. a year; that the arrears on the north half of the lot have been paid by Germain up to June, 1854; that the book shewed Lamotte in arrears £25 16s. 0d., to and

including the year 1833, and he supposed Germain paid on the north half as far back as that; that in 1848 or 1849, plaintiff applied verbally to be recognized as tenant of the north half of the lot, and said he was willing to pay the arrears if he got a lease (meaning an ordnance lease); but it was objected to unless the arrears on the whole lot were paid off; and so it went on till the 15th of June, 1854, when an ordnance lease was made to Germain for thirty years, renewable, made to him as assignee of plaintiff. This witness only spoke from what the books in the office imported, and did not speak from personal knowledge.

He had no knowledge of plaintiff having paid any rent to the department. It further appeared that—1st, By indenture made the 13th of May, 1829, John Mulhill, in consideration of £30, granted, bargained and sold, &c., to Paul De Lamotte, his heirs and assigns for ever, all, &c., in Lower Bytown, being lot letter K. on Sussex street, specially described—and the rents, &c., and all the estate, right, title and interest, &c., at law or in equity of said Mulhill; *habendum* in fee, with covenant for seizin in fee, right to convey, &c. It is in the usual form of conveyance in fee.

Second. By deed poll, 6th of December, 1836, Paul De Lamotte, in consideration of £25, bargained, sold, assigned, &c., to Charles Brossard the north half of said lot letter K., and all the estate, &c., right, title term of years to come, possession, claim, &c., of said De Lamotte; *habendum* to said Brossard, his executors, administrators and assigns for ever, under and subject to the payment of an annual rent of £3 sterling, to such officer of Her Majesty's Ordnance as may from time to time be duly authorized to receive the same, and performing the several covenants, conditions and agreements that may at any time hereafter be reasonably and lawfully required by Her Majesty's government to be done and performed, touching and concerning the same—covenant for quiet enjoyment on these terms.

Third. Charles Brossard assigned to J. B. Lavvie.

Fourth. Lavvie assigned to Thomas Masson.

1849—Masson assigned to Joseph Bell.

1849—October 29th, Bell assigned to John Scott.

1849—November 9th, Scott assigned to plaintiff Sparrow.

It was admitted the plaintiff claimed under De Lamotte. Plaintiff proved that he came into possession eight or nine years ago, and therefore claimed to be owner since 21st of September, 1843.

1851—December 22nd, Bank of Upper Canada obtained a judgment against plaintiff, John Sparrow and John O'Dougherty, for £1010 15s. 7d., &c.

1852—July 30th, *Fieri Facias* issued thereon against goods and chattels to sheriff of Carleton, tested 13th of June, (15 Vic.) returnable 1st of T. T., then next; endorsed to levy £521 5s. 4½d., &c., received 31st July. Returned, made £409, and as to residue goods on hand for want of buyers.

1853—February 5th, *Ven. Ex.* issued to same sheriff, tested 29th of June, (16 Vic.) endorsed to make £146 6s. 3d., &c., in all: £151 9s. 6d. received 7th of February, 1853. Returned, made £151 9s. 6d.

1853—March 8rd, by deed poll plaintiff demised to Antoine Champagne part of lot letter K. west of Sussex street, upon which the dwelling-house is erected known as the blue-house, extending in rear from said blue-house as far as to include the small stable, and no further, to hold from the first of May then next for three years at £24 yearly rent, payable monthly in advance; to keep in repair and render up at the end of the term. Plaintiff covenants for quiet enjoyment, &c.: tenant to pay all taxes, &c.: executed under seal by both—not registered.

1853—June 23, by deed poll Simon Fraser, sheriff of Carleton, after reciting the writ of *Ven. Ex.*—that after the receipt of the *Fi. Fa.* therein mentioned, and before its return, he did, under it and other writs of *Fi. Fa.* against plaintiff's goods, &c., seize and take in execution all the estate, right, title, term of years yet to come and unexpired of said plaintiff, of, in and to the said north half of lot letter K., &c., and which was part of the goods and chattels returned as remaining on hand for want of buyers; and that under the said *Fi. Fa.* and *Ven. Ex.* and other writs of *Fi. Fa.* he did, on the 15th of June, 1853, due notice having

been given, sell all the estate, term, &c., of said plaintiff, of and in the same, at public auction, to Nazarin Germain, for £160. He, in consideration thereof, assigned to him all the estate, right, title, term of years, &c., of said plaintiff, of, in and to the said half lot, &c.; *habendum* to said Germain, his executors, administrators and assigns, subject to the rents due and to become due to the principal officers of Her Majesty's ordnance, in as full, large, and ample a manner as he, the said sheriff, under said writs of execution on any of them, could sell and convey the same, &c.,—registered the 23rd of June, 1853. By indenture made the 15th of June, 1854, the principal officers of Her Majesty's ordnance, demised and leased to Nazarin Germain the north half of said lot K., for thirty years from date, at £3 6s. 8d., yearly rent, payable on the 1st of May in each year, the first payment on the 1st of May next; renewable by like terms of thirty years, forever, with right to the fee simple on payment of £55 11s. 2d.,—not registered.

The sheriff (Fraser) said, as a witness, he had sold the said north half lot to Germain as a chattel; that he heard the plaintiff objected to the sale, but did not recollect that he did so at the sale or before it, though he understood at the time or soon after that he did so. The deputy sheriff said plaintiff gave him a memorandum of lands before the sale, including the north half of lot K.; and that he heard some objections on the day of sale, unless the price plaintiff laid on it was obtained. Mr. Lewis, called as a witness for defendant, said plaintiff did not object at the sale, but declined agreeing to his wife's barring her dower, unless the property brought a certain price; that he is solicitor to the ordnance, knew the lot and knew that it was part of the land mentioned in statute 7 Vic. chap. 11; that documents were placed in his hands as such solicitor respecting the plaintiff's right, the assignments produced being some of them but not all—referring to the assignments above mentioned. A witness for plaintiff proved that he knew the lot before 1843, and that there have been buildings on it fifteen or sixteen years, and before the 21st of September, 1853, worth £10 and upwards.—See the statute 7 Vic., ch. 11, secs. 4 & 7.

It was contended the plaintiff held as a squatter, and not as tenant, and so had no saleable interest.

The learned Chief Justice ruled that he had a reversionary interest, which interest was a chattel interest only, and so liable under the *Fi. Fa.*, which could only impart to Germain the plaintiff's place in relation to the board of ordnance on the one hand, and to the defendant on the other; that he acquired the plaintiff's rights. The jury found for the defendant. The plaintiff has leave to move to have it entered for him on all or any of the issues, if in law entitled thereto, or as he might be so entitled, for £26 15s. 0d. All the assignments from Mulvhill downwards to be admitted.

The learned Chief Justice told the jury to find for plaintiff on the first and second issues, and for defendant on the third and fourth, but they rendered a general verdict. After which Mr. Scott, for defendant, said Mr. Lees, for plaintiff, had leave to move as above mentioned, it being so mutually understood.

During Michaelmas Term 19 Vic., *Wilson, Q. C.*, obtained a rule nisi to shew cause why the verdict on all the issues except that on the third plea, should not be set aside and a verdict entered for the plaintiff, pursuant to the leave reserved.

Helliwell shewed cause, referring to the statute 7 Vic. ch. 11, secs. 4 & 7.

Wilson, Q. C., in support of the rule, contended that it was not a saleable interest—Sparrow not a tenant from year to year. As to pre-emption; the equitable right follows the legal estate.—*Sheldon v. Chisholm*, 2 Grant's Chancery Reports. The 7th Vic. ch. 11, sec. 1 and schedule, vested lands, including the tract in question, in the principal officers of Her Majesty's ordnance; and the question is, whether Sparrow, the plaintiff, is to be regarded as holding possession within the meaning of the 4th and 7th sections of the act—See 4 & 5 Vic. ch. 100, sec. 11.

MACAULAY, C. J.—I thought at the trial, and still think, that plaintiff held within the 4th section, and was recognized by the officers of the ordnance as a tenant from year to year, in

the absence of any more specific term—Doe dem. Shore v. Porter (3 T. R. 13); that his interest was a chattel legally saleable under the executions against goods and chattels, and that the rule should be discharged.

McLEAN, J. and RICHARDS, J., concurred.

GRAY ET AL. V. McMILLAN.

Notary—Certificate of.

A certified copy of a power of attorney to convey lands, &c., from the Depositary of Notarial Records in Lower Canada, under the corporate seal of the Board of Notaries of Montreal, Lower Canada, is admissible in evidence, it being presumed that such power of attorney, though not in itself an official document, came officially into the hands of the notary among whose records it was found.

This is a rule to set aside a nonsuit on leave reserved.

The plaintiffs claimed under an indenture of bargain and sale, dated the 18th February, 1829, from John McKindley, executed by him by David Ross his attorney. The power of attorney was not produced; but plaintiffs offered a copy certified the 14th June, 1855, under the corporate seal of the Board of Notaries in and for the District of Montreal, signed by the secretary, M. B. N., certifying that it was a true copy of the original power of attorney found in the notarial records of the late Henry Griffin deceased, in his lifetime a notary public in Lower Canada—the said notarial records deposited in the archives of the said board of notaries, of which archives he was depositary.

The power purports to have been made and executed the 12th May, 1855, at Greenock, empowering four persons in Lower Canada, including Ross, jointly and severally to execute deeds, "all and each of them my true and lawful attornies and attorney; for me, and in my name, to sell &c., any part of my lands in Upper or Lower Canada, and to pass and execute deeds of sale and conveyance for the same, giving to all and each of them, jointly and separately, all powers and authority necessary in the premises, &c."

The objection is, that, though upwards of thirty years old, the power of attorney is not a document that can be proved by certified copy under the statutes.

Plaintiff took a non-suit. During Michaelmas term last a rule was obtained for defendant, to set aside the nonsuit and for a new trial.

Sherwood shewed cause, and contended the power of attorney was not a public or official document within the 13 & 14 Vic. ch. 19, sec. 4. That although thirty years old apparently, that did not dispense with its production, or render a copy proof of it, in its absence. That if less than thirty years old, it is not a document susceptible of proof by a certified copy, like original public or official entries in notarial acts or proceedings. That the statute applies only to documents originating with the notary or otherwise of record, as notarial acts or archives, not foreign instruments merely deposited with him without (so far as shewn) any actual necessity. There is no proof of lands sold under it, or of its being acted upon in Lower Canada, requiring its being filed with the notary, if necessary to be left.

Richards, A., in reply, submitted: That if the original had been produced it would prove itself being upwards of thirty years old—*Doe dem. Oldham v. Wolley*, 8 B. & C. 22; *Doe dem. Coore v. Clarke*, 2 T. R. 741, B. N. P. 155-8; *Le Cheminant v. Pearson*, 4 Taunt. 376; and it did belong to the corporation under the statutes. Referring to 10 & 11 Vic. ch. 21, 13 & 14 Vic. ch. 39, 13 & 14 Vic. ch. 19, sec. 2.

That the power of attorney must be presumed duly and necessarily filed with the notary in course of being acted upon, and being so filed and transferred to the corporation, it became a public document within the act, wherefore a copy was admissible in lieu of the original; and being so, the copy shews it thirty years old; and such copy being admissible in lieu of the original, and the original appearing to remain in the proper place of official deposit, the copy imports a power of attorney exceeding thirty years old, and proves the same without more, just as if the original had been produced.

On the whole, therefore, he urged that the verdict should be set aside, because the copy was improperly rejected in evidence at the trial.

MACAULAY, C. J., delivered the judgment of the court.

The 13 & 14 Vic. ch. 19, sec. 4, enacts that a copy of any *official or public document* in this province, certified under the hand of the proper officer or person in whose custody such official or public document shall or may be placed, or a copy of any document, by-law, rule, regulation, or proceeding, or a copy of any entry in any register or other book, of any corporation created, or to be created by charter or statute of this province, purporting to be certified under the seal of such corporation and the hand of the presiding officer or secretary thereof, shall be receivable in evidence of any particular, in any court of justice, or before any legal tribunal, &c., or in any judicial proceeding, without any proof of the seal of such corporation or of the signature, or of the official character of the person or persons appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence. The question is, whether the power of attorney in question is a document of the corporation of notaries in Lower Canada, under the 10th & 11th Vic. ch. 21.

By the 13 & 14 Vic. ch. 39, sec. 3, number 4, which last renders it the duty of each board of notaries (created corporate bodies by section 1,) to receive and keep the records of notaries deceased, absent or removed from office or interdicted.

Sec. 2, No. 2, empowers the secretary to have custody of all records and deliver copies thereof, &c. 10 & 11 Vic. ch. 21, secs. 20, 24, requires the records of deceased notaries to be deposited with the board of notaries; see number 6 and 16 Vic. ch. 19, sec. 9.

A witness from Montreal proved that when a power of attorney of the kind in question is acted upon before a notary public in Lower Canada, as by conveying an estate under it, it is necessarily deposited with, retained and filed of record by the notary, and not afterwards removeable. Brooms *Maxims*, 427-8: "It is a maxim that all acts are presumed to be rightly done"; which maxim, applied to the filing of the power of attorney, justifies the inference that it must have been acted upon and have come officially into the hands of the notary, although there is no proof that any act or conveyance was passed under it before such notary.

I believe my learned brothers think such presumption should be *prima facie* made, and that the instrument, though not itself an official act or record before the notary, is within the spirit and meaning of the statute, and should be regarded as a document of the corporation, and as such capable of secondary proof by an official copy duly certified (as this was), without the production of the original. I was under a different impression at the trial, but fully assent to the expediency of holding this instrument within the provisions of the statute, if it can legally be done.

Being upwards of thirty years old, it would upon production prove itself, and therefore the objection to the admissibility of a copy without proof of the original has the less weight. But if a power of attorney, executed elsewhere than before the notary, and filed as this is, becomes a document proveable by a certified copy without proof of the execution of the original, or without shewing that it was proved before the notary (like the execution of deeds before the registrar, under our registry laws), evidence of an instrument may be thus obtained, though recently executed according to its date and import, &c., without any proof of its due execution. If the mere filing it is to render it an official document, I still feel great objection to its adoption; but if its due proof is presupposed, then regarding it as proved (*prima facie*) once for all, unless afterwards impeached (see 16 Vic. ch. 19, secs. 5, 6, 7), it is desirable that the reception of a copy in evidence should be approved, in accordance with the objects of the statute.

Rule absolute without costs.

MCGILL V. FRAZER, AS LANDLORD, &c.

By patent of 22nd of May, 1797, lot No. 36, in the 6th concession Charlottenburg, was granted unto the widow of Allan McDonell and her heirs, &c., 238 acres, specially described.

By will of 11th of December, 1802, Eleanor McDonell of M. devised to her brother-in-law, Archibald McDonell, one lot of land in Charlottenburg, 238 acres, to whom letters of administration were granted. It appeared in evidence that Kennedy was married to Helen, one of the daughters of Colonel and Eleanor McDonell and a niece of A. McDonell, and that Kennedy's wife survived him: that a conveyance was drawn from A. McDonell to Donald Kennedy for half—seemingly the west half—of the lot: that A. McDonell arranged a dispute with one Grant, who claimed the lot on account of a debt; and that he Grant afterwards occupied the east half: that there were a great many Allan McDonells in Glengarry, and many widows by the name of Eleanor McDonell: that Kennedy's wife had children, and survived him.

That by indenture of mortgage, dated 31st of October, 1835, Kennedy and Helen his wife, conveyed to Angus McDonell, his heirs, &c., the west half of lot No. 36, in the 6th concession Charlottenburg, 100 acres, in fee, to be void on payment of £150 in two payments on the 1st of October, 1836 and 1837, which mortgage was not acknowledged by the *feme covert*, as required by the statute 1 Wm. IV. ch. 2.

By indenture of 4th of November, 1837, annexed to the above mortgage, Angus McDonell assigned to Holmes and Spiers, their executors, &c., the land, &c., in Charlottenburg, to hold to them, their executors, &c., for the residue of the term in mortgage mentioned; and Holmes and Spiers, by indenture of the 6th of August, 1838, demised to Kennedy the lot in the mortgage mentioned for twelve months from date, and to be then restored to Holmes and Spiers, who by indenture of the 28th of January, 1841, assigned to plaintiff, his executors, &c., for the residue of the term in mortgage mentioned, the west half of lot No. 36, &c.

In ejectment for the west half by plaintiff, claiming under assignment from Holmes and Spiers, and on a possession by K. of over twenty years—*Held*, first, that if the identity of the patentee, Eleanor McDonell, were established, her will, if valid, gave only a life estate to Archibald McDonell; and that, he being dead, the land would descend to and belong to Eleanor McDonell's children.

Held, also, that the mortgage by Kennedy and wife to Angus Macdonell was inoperative as to Kennedy's wife's share of the lot, not having been acknowledged by her as required by the statute 1 Wm. IV. ch. 2.

Writ issued 10th of March, 1854. Ejectment for west half of lot No. 36, 6th concession, Charlottenburg, against Isabella Grant, Catharine Grant, Mary Grant and Betsey Grant.

Patent 22nd May 1797, granted unto the widow of Allan McDonell and her heirs, &c., all, &c., containing 238 acres, more or less, being lot No. 36 north side river Aux Raisins, Charlottenburg, specially described as beginning at a post on the north bank marked $\frac{3}{4}$; then north 24° west, 119 chains; then south 66° west 19 chains; then south 24° east, 122 chains to the river, and thence north 66° easterly 19 chains, along the river to the place of beginning on the bank of the river.

Will, 11th of December, 1802. Eleanor McDonell, of Marysburg, devised to her brother-in-law, Archibald McDonell, of Marysburg, one lot of land, containing 238 acres, in the township of Charlottenburg, in the county of Glengarry, 50 acres of family lands below Kingston, *with* some personal property, viz., knives, ladle, spoons and a metal stove; witnessed by three witnesses and signed Eleanor ^{her} × McDonell.
_{mark.}

No executor is named in the copy of the will filed, but on the judge's notes it is stated that Archibald McDonell was appointed sole executor.

On the 3rd of June, 1815, Archibald McDonell made an affidavit before Alexander Fisher, surrogate, duly to administer the will; and a memorial thereof was registered, dated 5th of June, 1815, and signed by him. It was proved by Colonel D. McDonell, Deputy-adjutant-General, that Archibald McDonell was a first cousin of his mother: that he understood and always understood in the family, that he had a brother named Allan, who was said to have been drowned in Lower Canada, leaving a widow named Eleanor, who resided with her brother-in-law, said Archibald McDonell: that Donald Kennedy, deceased, was married to a daughter of Colonel Allan and Eleanor McDonell and a niece of Archibald McDonell, and that his, Kennedy's said wife, survived him: that Colonel Archibald McDonell was in Glengarry in 1816: that on the official books in the Crown Land office no other lot is mentioned as containing 238 acres except the one granted as above: that, seemingly in 1816, a conveyance was drawn by the witness from Archibald McDonell to Donald Kennedy for half—the witness thought the west half—of the lot on which Kennedy was living at the time, and which he occupied for a good many years; but he had since heard that there was some defect or mistake in the deed in the number of the lot: that there was a dispute between Colonel Archibald McDonell and John Grant of Lachine, respecting one-half of the lot, which was arranged in 1816, and the east half was afterwards occupied by Duncan Grant: that there were a great many Allan McDonells in Glengarry, and probably many widows of Allan McDonells. Duncan McDonell,

brother of the Deputy-adjutant-General, corroborated his evidence as to the identity of the grantee. He also said, that Colonel Archibald McDonell is dead: that Grant of Lachine, claimed the lot on account of a debt which he and Colonel Archibald arranged, in 1815 or 1816, by each taking one half: that Donald Kennedy married a daughter of Allan McDonell, who survived her uncle, and may be still living. It was admitted she had had children, and was said to be dead. Another witness (John Smith) said Donald Kennedy lived on the west half of the lot: that he came there a year or two after the last war, and left about the year 1838, and is now dead, leaving three sons living: that he told witness he had burnt the deed because he did not get the whole lot. He proved the execution of an indenture of mortgage, made the 31st of October, 1835, between Donald Kennedy and Helen his wife, of Charlottenburg, and Angus McDonell, whereby, in consideration of £150, said Kennedy and his wife granted, bargained, sold, &c., to said Angus McDonell and his heirs, &c., the west half of lot No. 36, 6th concession Charlottenburg, 100 acres more or less, *habendum* in fee; with a proviso for avoiding the same upon payment by the said Kennedy and wife to said Angus McDonell of £150, with interest from date, £75 on or before the first of October then next, and £75 on or before the first of October, 1837, with covenant to pay, &c., executed by both parties of the first part—endorsed certificate of registration of a memorial on the 3rd of November, 1815. No acknowledgment of the *feme covert* appears. It was stated that Kennedy got possession from Duncan Grant, who had previously occupied the whole lot, the time being when Colonel Archibald McDonell was at Glengarry, and that Colonel Frazer recovered possession in ejectment about three years ago.

Another witness (John Grant) said that Kennedy received possession from his father, and continued possessed till 1838: that he understood that the lot was to be divided between Kennedy and Grant, but that wrong numbers of the lot had been inserted in the deeds of both halves.

4th November, 1837. Indenture: Angus McDonell, in consideration of £150, assigned to James Holmes and John

Spiers, their executors, administrators and assigns, all that tract of land, &c., containing 100 acres more or less, in Charlottenburg (no lot mentioned), to hold to said Holmes and Spiers, their executors, administrators and assigns, for and during the rest, residue and remainder of the said term to come, &c., in the annexed mortgage mentioned, free from all incumbrances: it is annexed to the above mentioned mortgage, which is in fee. Registered 13th of November, 1837.

By indenture 6th of August, 1838, Holmes and Spiers demised to Donald Kennedy the half lot mentioned in the aforesaid mortgage, for twelve months from date, to be then restored to the lessors or their assigns. It is signed by Holmes and Spiers by their agent Alexander Frazer and by Donald Kennedy.

By indenture 28th of January, 1841, Holmes and Spiers assigned to plaintiff (consideration £150), his executors, administrators and assigns, for the residue of the term in the mortgage mentioned, being the west half of lot No. 36 in the 6th concession Charlottenburg, covenant for good right to assign and for quiet enjoyment against Donald Kennedy and Helen his wife, and their heirs and assigns.

Defendant's counsel moved a non-suit, on the ground that the will of Eleanor McDonell, if valid, gave only a life estate to Colonel A. McDonell; and, he being dead, plaintiff cannot recover on his title: that having shewn the nature of Kennedy's title under him, Archibald McDonell, the plaintiff, cannot abandon that claim of title, only upon Kennedy's possession: that it was not sufficiently proved who the patent was intended for, or that Eleanor, the deviser, devised any particular lot to Colonel Archibald McDonell. The learned judge (McLean, J.) held the proof insufficient to identify the grantee of the Crown; and that, if clear, the devise under which plaintiff claimed title, if sufficiently explicit as to the lot of land, gave a life estate only to Archibald McDonell; and he being dead, the estate belonged to and would descend to Eleanor McDonell's children; and so directed the jury, who found for defendant, saying that they were not satisfied of the identity of the parties. Plaintiff's counsel contended that he had opened the case upon pos-

session, as well as title, and could recover on Kennedy's possession, which exceeded twenty years, but was overruled.

There is with the exhibits a writ of *Hab. Fac. Pos.*, issued 9th of July, 1838, to the sheriff of the Eastern District, to give possession of west half of lot No. 36, 6th concession Charlottenburg, on the demise of Holmes and Spiers: returned,—Executed. It was against Roe, and seemingly upon a judgment by default. No title was shewn in Archibald Frazer, nor did it appear when or under whom the Grants became possessed, or that Kennedy entered and held under the demise from Holmes and Spiers for a year, nor who was ejected by them in July, 1838, the month preceding such demise.

In the following term *Richards* obtained a rule on defendant to shew cause why the verdict should not be set aside.

In Trinity Term, 19 Vic., August and September, 1855, *Brough* shewed cause, and contended—First. That the original grant was void for want of certainty in the grantee—Cro. El. 328,

Second. That she only devised a life estate to her uncle, Archibald McDonell.

Third. That Kennedy married a co-heiress of the grantee; and plaintiff claiming under him, and he being dead, his interest ended, and his wife did not pass her estate in remainder in fee by the mortgage, not having acknowledged it.

Richards, in reply, relied upon the fact that Archibald McDonell had conveyed to Kennedy upwards of twenty years before action, under whom plaintiff claims, the possession having continued as derived from Archibald McDonell ever since. But it did not appear what child or children, if any, other than Kennedy's wife, survived Eleanor their mother. (It was said two daughters survived her). Nor did it appear when Archibald McDonell died.

If Archibald McDonell, the devisee for life, died before the date of the mortgage—31st October, 1835—it would follow that at that time Kennedy and wife were seised of a moiety in right of the wife; and as to the other moiety, that he held as by intrusion upon or ouster of the co-parceners of the wife—Crabb S. 2456 b. As to the wife's moiety, the deed would be void against both.

MACAULAY, C. J., delivered the judgment of the court.

If I thought the plaintiff could establish a case at another trial I should be disposed to grant a new trial, because I think there was evidence to go to the jury, from which they might have inferred the identity of the grantee of the crown with the devisor to Archibald McDonell.

But the facts present the difficulty, that the will of Eleanor McDonell gave only a life estate to Archibald McDonell; wherefore from the time of his death Kennedy and wife held occupation of the half lot in right of his wife, she being a daughter of one of the co-heiresses of Eleanor McDonell; wherefore as to her share of the lot, the mortgage to Holmes and Spiers was inoperative, not having been acknowledged by Kennedy's wife, as required by the statute 1 W. IV. ch. 2—Doe dem. McDonald v. Twigg et al. (5 U. C. Q. B. R. 167), Doe dem. Burnham v. Simmonds (7 U. C. Q. B. R. 600), Robertson v. Norris (11 Q. B. 916).

It does not follow, however, that the mortgage may not be good against Kennedy for the residue of the lot—that is, for the portions that belonged to his wife's sisters, as co-parceners; and it is said she had one or more sisters living at Archibald McDonell's death, and left issue surviving her, at her own death. The difficulty here is, that although Kennedy may have been possessed as by abatement or intrusion of the share other than his wife's—see 1 W. IV. ch. 1, sec. 24—and so be bound by estoppel under his mortgage *pro tanto*, still the defendants are (Frazer as landlord of the Grants), tenants in possession; and it does not appear that they entered or held under Kennedy; and if not, they may, though not entitled themselves, set up the *jus tertii*, or the title of the sisters of Kennedy's wife—Doe dem. Harding v. Cooke (7 Bing. 346), Doe dem. Smith v. Webber (1 A. & E. 119), Allan v. Rivington (2 Sand. 111). Kennedy may be still living, and be tenant by the curtesy of his former wife's portion; but if the deed of himself and wife as to that part be inoperative as to either, by force of the statutes—Doe dem. McDonald v. Twigg, et al. (5 U. C. Q. B. R. 167), Doe dem. Burnham v. Simmonds (7 ib. 600), Robertson v. Norris (11 Q. B. 917)—it would not affect the separate interests of Kennedy in her

real estate—that is, as tenant by the curtesy; consequently, I do not see that in any point of view a new trial can be of any ultimate avail to the plaintiff.

Per Cur.—Rule discharged.

WAKEFIELD AND SKELTON V. LYNN.

Estoppel.

R. being indebted to L. gave him a chattel mortgage and a confession of judgment, to secure the amount: R. after the mortgage became due, made an assignment for the benefit of creditors to W. and S., who took possession of the goods, &c.: L. then put a writ of *Fi. Fa.* in the sheriff's hands, directing him to levy and make the amount of his debt, &c., out of the goods, &c., of R.

Held, that the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mortgaged to him as the goods of R. did not estop him from setting up his title under the chattel mortgage.

The declaration having been amended since the last trial the issue is now said to be, whether the goods in question were, at the time of the seizure thereof in the City of Toronto, under a writ of *Fi. Fa.* at the suit of the defendant against the goods of John Rogers—namely, on the 25th of January, 1855—the goods of the plaintiffs.

The plaintiffs allege, that the said goods were the goods of the plaintiffs at the time of their being so seized and taken by the sheriff as aforesaid, of which defendant had notice.

Plea: That the said goods, at the time of their first being seized and taken by the sheriff as aforesaid, were not, nor were any of them, the goods of the plaintiffs in manner and form by plaintiffs alleged, but were then the goods and chattels of the said John Rogers, liable to be seized and taken by the sheriff under said writ: to the country, &c.

The plaintiffs made claim thereto under an assignment from the said Rogers to them made on the 24th day of January, 1855, under which the goods—being principally in a store of said Rogers, and part in Platt's yard—were on the same day delivered to the plaintiffs, being so assigned for the benefit of his creditors, and which assignment was not in itself impeached as fraudulent or void. But the defendant set up a prior bill of sale of that portion of the said goods claimed by the defendant to belong to him, made by the said Rogers the 8th of July, 1854, and registered the 21st of July, 1854,

of all the wares then in the shop of Rogers, to be void on payment of £450 on the 8th of November, 1854.

This bill of sale, so far as it was capable of transferring the goods therein referred to, was not disputed, so far as respected the fact of its being a *bond fide* assignment to secure a debt to the amount mentioned ; but it was contended to have ceased to bind the goods on two grounds :—

First. About three weeks before the 24th of January, defendant had been pressing Rogers for money ; but, owing to Rogers being pressed as endorser of some promissory notes for others, defendant said he would give him six months, if he gave him good security ; and Rogers got him promissory notes of Joseph Helliwell & Sons to cover all that was due him ; and in a pass-book was shewn, in defendant's writing, a statement of Rogers's account, with an entry 21st of December, 1854 : " By note of Joseph Helliwell & Sons, £580 3s. 5d." These notes were given to secure defendant, who was Rogers's largest creditor ; and there was evidence that defendant told Helliwell that he would not send the notes to the bank or get them discounted ; and Rogers said he gave Helliwells his note for the same amount as their note to the defendant. The Helliwells failed soon after ; and on the 16th of January, 1855, Rogers signed a paper writing restoring the defendant's right under the bill of sale.

Second. On the 25th of January, 1855, the defendant obtained a *Fi. Fa.* against the goods of Rogers, under a judgment entered by him in the Common Pleas. On the same day the deputy-sheriff, being told by the defendant's attorney to seize the goods in Rogers's shop, in the market, went immediately, and found it shut up, and the goods in possession of an agent of the plaintiffs ; but upon his application, Skelton delivered up the key &c.: levy was made of goods in the store and in Platt's yard. Notice of plaintiffs' claim was duly served on the sheriff, and his application under the statute has led to this issue.

There was a good deal of evidence respecting the identity of the goods assigned to plaintiffs and seized under defendant's *Fi. Fa.* with those covered by Rogers's assignment to defendant. It appears that Rogers had gone on selling and buying

in the ordinary course of his business, from July 1854 to January 1855, and various changes had been made in the stock of goods; but it appeared that a good many of those, principally crockery-ware that had been sold by defendant to Rogers, and covered by the bill of sale of July to defendant, were still in the store or in Platt's yard, and, so far as capable of being identified, form the subject of this issue, except that defendant contends that some other portions of the goods seized under his *Fi. Fa.* were not included in Rogers's assignment to the plaintiffs.

At the close of the plaintiffs' case the Chief Justice noted, that if defendant, having taken an assignment and afterwards getting Helliwells' notes to cover his whole debt, either on that account or for any other reason, treated the same goods afterwards as belonging to Rogers, and liable to his execution, desiring the sheriff to seize them, the Chief Justice thought he thereby abandoned his claim under the bill of sale, and reduced the question to the inquiry, whether the plaintiffs' subsequent bill of sale was valid and entitled to prevail against the execution, putting the assignment out of the question: that he saw no proof of fraud in the assignment to the plaintiffs, though it did privilege some creditors more than others on the face of it: that the paper of the 16th of January was material, as it would seem that Helliwells' note without it may have been understood at first as intended to stand in place of the assignment; and afterwards, when the Helliwells were known to be in bad circumstances, defendant then wished to revert to his bill of sale, if he pleased, or to treat the goods as still Rogers's, and sell them under his execution; then, if being in that position, he went and directed those goods to be seized under his writ, he abandoned, as the Chief Justice conceived, his title under the assignment. There is an account of 28th of June, 1854:—

John Rogers to S. G. Lynn.....	£365	6	2	
Add account to date	65	11	7	
				430 17 9
Paid in full.				
By one Note at three months from 28th June.....	182	18	0	
“ “ “ four “ “ “	182	18	2	
“ “ “ three “ “ 12th July.....	65	11	7	
				430 17 9

(Signed)

SAMUEL G. LYNN.

Helliwell & Sons' note is dated Toronto, 21st of December, 1854, to pay John Rogers or order, six months after date, £580 3s. 5d., endorsed by him in blank, and protested by the Bank of Upper Canada for non-payment the 25th of June, 1855. The memorandum from Rogers to Lynn was as follows:—

16th January, 1855.

“On the 21st of December last, I gave Samuel G. Lynn a note, drawn by Joseph Helliwell & Sons, six months from 21st of December, 1854, for £580 3s. 5d., as security for that amount owing him by me, and for which he holds a bill of sale and confession of judgment: now hearing that the aforesaid Joseph Helliwell & Sons are in an insolvent position, I hereby authorise Mr. Samuel G. Lynn to make use of any means he may think proper, to secure the payment of the aforesaid £580 3s. 5d.; either by putting the execution in force, or otherwise as he may see fit in the premises: as witness my hand and seal this 16th day of January, 1855.

“(Signed) JOHN ROGERS [L.S].”

The bill of sale of 24th of January, 1855, to the plaintiffs is, among other things, “All and singular the stock-in-trade, goods, wares and merchandize of the said John Rogers, chiefly being in a certain shop of his, at or in the St. Lawrence market or arcade, in the city of Toronto; and also all his household furniture, &c., and all notes, bills, debts, &c., and all other the estate of the said Rogers, real or personal, where-soever situated,—a schedule of which said personal property, goods, wares and merchandize and household furniture, will be prepared and annexed to these presents, but the want or absence of which shall not vitiate these presents,—upon trust to take possession and sell the same for cash or on credit; and after paying costs and expenses, to pay three small sums due for money borrowed of the three persons named therein, and the residue ratably among the creditors of said Rogers, who shall execute the same within the time above mentioned (no time being mentioned), as per schedule annexed.” Registered the same day. There is a schedule of goods, said to be those sold by defendant to Rogers, amounting to £280, dated 2nd February, 1854, instead of 1855. Verdict for plaintiffs.

During Michaelmas Term *Hallinan*, for defendant, obtained a rule *Nisi* to set aside the verdict for misdirection.

Hagarty, Q. C., shewed cause, and said the Chief Justice ruled in plaintiffs' favor, as Burns, J., had done at the first trial: that the identity of the goods was not proved corresponding with the bill of sale to defendant, nor were they in the store when it was executed and delivered, but in Platt's yard: that the chattel mortgage to defendant was displaced by a subsequent settlement, and promissory notes of Helliwells accepted in satisfaction of the debt secured: that the Chief Justice did not rule in plaintiffs' favor, but left it to the jury.

Hallinan, in reply, contended that the Chief Justice expressed an opinion differing from this court on the effect of defendant's execution upon his chattel mortgage: that the goods were in Rogers's store, and not in Platt's yard; and that Platt's yard was in effect Rogers' store, or part of it as appurtenant. He relied upon the former decision, and submitted that no new facts appeared materially altering the case—*Whale v. Lenny*, 2 M. & P. 20; *Jacobs v. Latour*, 5 Bing. 180; *Gadsden v. Barrow*, 9 Ex. R. 514.

MACAULAY, C. J., delivered the judgment of the court.

The statute 12 Vic. ch. 74, sec. 1, enacted that every mortgage (or conveyance intended to operate as a mortgage) of goods and chattels (which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged) shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or conveyance (or a true copy thereof), together with an affidavit of a witness thereto, sworn before a commissioner of the Queen's Bench, of the due execution of the mortgage or conveyance, &c., shall be filed as afterwards directed.

Section 2. Such mortgage to be filed in the office of the clerk of the District Court.

Section 3. That every mortgage or copy thereof filed in pursuance of this act shall cease to be valid against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within

thirty days, next pending the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof, shall be again filed, &c.

The 13 & 14 Vic. ch. 62, amended the 1st section of the above act by adding thereto, "and that every sale of goods and chattels which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of the said act; and that the mortgages and conveyances mentioned in the said act shall be accompanied with an affidavit of the mortgagee or bargainee of such goods, sworn before a commissioner of the Queen's Bench or Common Pleas, to the effect, in the case of a mortgage, that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the said mortgage; that it was executed in good faith, and for the express purpose of securing the payment of the money so justly due, and not for the purpose of protecting the goods and chattels mentioned therein as against the creditors of the mortgagor (and in case of an absolute sale, that the sale is *bond fide* and for good consideration), setting it forth, and not for the purpose of holding, or of enabling the bargainee to hold, the goods mentioned therein against the creditors of the bargainor; otherwise such mortgage or sale shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith." The statutes do not declare that a mortgage duly registered shall be valid, but that if not registered it shall be void; leaving the question whether a registered mortgage is founded upon a valuable consideration and *bond fide* as against creditors to be determined on, irrespective of the mere act of registry, any further than as such registry may be constructive notice of the incumbrance, and weaken the force in evidence of the fact that possession was retained. However these statutes may give implied sanction or encouragement to sales or mortgages, without possession accompanying or following the deed, they do not declare that any additional validity shall be given to

such assignments, unless as evidence by reason of its force in repelling the inference of fraud from the fact of possession not being changed in consequence of registration being substituted.

Heane v. Rogers and Lloyd (9 B. & C. 577)—Action by alleged bankrupt against his assignees for property sold by them. It appeared he had assisted the assignees by giving directions as to the sale of the goods: held referable to an intention to take care of the property and see that the most was made of it, and that it did not amount to an assent to the sale which estopped him.

Graves v Key (3 B. & Ad. 318 (a))—A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence except as to the person who may have been induced by it to alter his condition—referring to *Wyatt v. The Marquis of Hertford* (3 East, 147).

If a receipt be given to an agent, &c., in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security given fails. Not so if he do not shew that he was injured by reason of the false receipt, &c.

Pickard v. Sears (6 A. & E. 469).—In trover it appeared that plaintiff, being legal owner of certain goods, seized in the actual possession of a third party under an execution against such third party, and sold by the sheriff to defendant. *Held*, the jury might infer that plaintiff authorised the sale, from his consulting with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure and intention to sell. In that case, the execution debtor (*Metcalf*) mortgaged the goods to plaintiff 15th of January, 1834, to secure payment of £913 and interest on 15th of January, 1835, with leave to plaintiff to enter and possess in case of default.

Hill obtained payment against *Metcalf*, and issued execution against the goods in April, 1834, and the goods (being in his possession) were seized and sold under it in August, 1834. Lord Denman, after much doubt being entertained, said the rule of law was clear, that where one by his words or

conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time, &c.; and held what the plaintiff had done sufficient to bind him.

Hunsden v. Cheyney (2 Vernon 150)—Held within the rule in Pickard and Sears.

Lord Denman said a person who negligently and culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he himself has assisted to deceive.

Coles v. The Bank of England (10 A. & E. 437), as to which see Freeman & Cooke (2 Ex. R. 654), Howard & Hudson (2 E. & B. 10), Chase v. Goble (2 M. & G. 930).

In a feigned issue to try whether goods at the time of seizure were the goods of claimant, it is competent to the execution creditor to set up the *jus tertii*.

Downs v. Cooper (2 Q. B. 256) turned upon the same principle as Pickard v. Sears.

Freeman v. Cooke (2 Ex. R. 654)—Trover by plaintiffs, assignees of Broadbent, against a sheriff, for conversion of B's. goods, seized under a *Fi. Fa.* against C. & D. It appeared that immediately before the sale the bankrupt told the officer that the goods were C's.; immediately afterwards denied it, and said they were the goods of D., though in reality his own, but said they were C's. to induce the officer to seize them: held, that it did not estop B. nor his assignees.

This case limits the force of Pickard and Sears materially. Parke, B., said, after citing passages from Pickard and Sears, and Gregg and Wells, that by the term "wilfully" in the rule thereby established we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly—Lyon v. Reed (13 M. & W. 309), as to estoppel *in pais*.

Parke, B., suggested in Freeman v. Cooke as a test, whether the facts could be pleaded as an estoppel, had B. been the plain-

tiff averring the goods to be his; also, that he thought it would be found that the person who makes a statement on which another alters his position is not estopped, unless he so induces him that he would be responsible to him in an action for it. (Cases of inducing credit to third persons apply to this view—see Crampton, J.)—Howard v. Hudson (2 E. & B. 13), Sheffield Railway Company v. Woodcock (2 M. & W. 574).

Lewis v. Clifton (14 C. B. 254-5)—In saying there was an estoppel in that case *in pais*, or by standing by added (a doctrine, by the by, which seems to me to have been carried to a dreadful extent).

Gadsden v. Barrow (9 Ex. R. 514)—A claimant plaintiff and an execution creditor defendant, in an issue to try whether the goods at the time of seizure by the sheriff under an execution were the goods of plaintiff, plaintiff proved a valid bill of sale to him of the goods. It was held competent to defendant to defeat the plaintiff's title by proving a prior bill of sale to a third party—Cheeseman v. Exall (6 Ex. R. 341)—much in point—Nicolls v. Bastard (2 C. M. & R. 659), Bryant v. Wardell (2 Ex. R. 479), Cooper v. Willomatt (1 C. B. 672), Howard v. Hudson (2 E. & B. 10).

Lord Campbell adopts and approves of the language of Parke, B., in Freeman v. Cooke. He said, I accede to the rule laid down in Pickard and Sears and Freeman and Cooke. If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel: it is not quite properly so called, but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out—Reed v. Bladés (5 Taunt. 219), Wood v. Dixie (7 Q. B. 892), P. S. 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62.

All this shews to me that the defendant's attorney directing the sheriff to levy on the goods in Rogers's store, including some of those mentioned in the mortgage to him, had not the effect of putting an end to the mortgage, either then or at an earlier period, so as to make those goods the goods of Rogers, and assignable as such by Rogers to the plaintiff before the execution in defendant's favor had been issued.

Feun v. Bittleston (7 Ex. R. 152), *Tapfield v. Hillman et al.* (6 M. & G. 245), as to identity.—The issue is not very distinctly framed to shew whether the sole question is whether the goods were plaintiffs, or whether they were liable to be taken in execution at defendant's suit. So far as the last proposition goes, I think the assignment to plaintiffs took precedence of the defendant's execution. It turns upon the validity of his prior right as mortgagee.

I am satisfied the seizure under defendant's execution did not extinguish it, but that it subsisted subject to the question, whether the defendant's conduct did not impart to Rogers a dispensing power over the goods mortgaged by retail or wholesale to purchasers for money; and if so, by retail or wholesale to any or all of his creditors, jointly or severally—See *Street v. Hamilton* (U. C. O. S. 1837–8), *Dyer v. Pearson* (3 B. & C. 38), *Dyer v. Pearson* (4 D. & R. 653), *Horn v. Baker* (9 East, 215), *Dean v. Whittaker* (1 C. & P. 347), *Closter v. Headley* (12 U. C. Q. B. R. 364).

It might be left to the jury to say whether *quoad* the goods covered by the mortgage to defendant he (defendant) had by his own conduct enabled Rogers to hold himself forth to the world as having not the possession only, but the property; for it is said by Abbott, C. J., in *Burwood v. Felton* (3 B. & C. 43), “If the real owner of goods suffer another to have possession of his property, and of those documents which are the *indicia* of property, then, perhaps, a sale by such person would bind the true owners”; or it might have been left to them to say whether the mortgage to defendant was fraudulent and void as against the other creditors of Rogers; for that defendant was a *bonâ fide* creditor there seems no room to question.

The objection to the first way of putting it is, that however valid a sale of the mortgaged goods might be to *bonâ fide* casual purchasers by retail, the same reasoning does not apply to a purchaser of the whole stock, and especially to assignees for the benefit of creditors; because as to them the registration of the mortgage was implied notice of its existence, and it behoved them to search the County Court office to ascertain whether any such incumbrance had been filed in favor of an individual creditor before an assignment was taken up for the benefit of all. If they had notice, then a subsequent assign-

ment with such notice could not be sustained on the grounds of implied power in Rogers so to assign; such a power would be inconsistent with the security filed, and the assignees would be driven to rely upon impeaching it for fraud as against them.

The case was not submitted to the jury on either of these grounds, but on the narrow ground that by authorising or directing the sheriff to levy upon all the goods in the store under his *Fi. Fa.*, if he really did so, the defendant waived, abandoned, or put an end to his chattel mortgage; and did so retrospectively, so as to let in and give validity to the assignment to the plaintiffs, though made before the delivery of such execution to the sheriff, and of course before any seizure under it, and therefore an assignment that could not have been influenced by it. The notice of the assignment to plaintiff by the defendant's attorney from the bailiff Severs was general, and the directions to levy were not special. There was no express direction given to the sheriff to levy upon the mortgaged goods; and to hold such general direction and a general levy to operate as a constructive waiver of the mortgage retrospectively, so as to displace it in favor of the assignment to the plaintiffs, I still consider a position not sustained by law.

I therefore think the rule should be absolute for a new trial without costs. Whether it is worth the defendant's while to persevere further, after the two verdicts that have been rendered against him, and in face of the objections to which his title is evidently exposed, it is for him to consider.

Per Cur.—Rule absolute.

IN RE DAY V. THE GRAND TRUNK RAILWAY OF CANADA.

Railway Company—Compensation by.

The Grand Trunk Railway Company of Canada, under their acts of incorporation, and under authority of a by-law of the Municipality of Guelph, ran their line of road through and along a street in Guelph to which the lands of the appellant were adjacent.

Held, upon application for a mandamus on the Railway Company, that if the works complained of amounted to a public nuisance, it would not be a case for private compensation, and that if authorized by law, that the works did not injuriously affect the applicant within the meaning of the fourth section of the statute 14 & 15 Vic. ch. 51.

This is a rule on the Railway Company to shew cause why a mandamus should not issue to them to serve a notice on said Day, containing a description of the powers exercised

and intended to be exercised by the said Company under the acts of Parliament for making the railway from Toronto to Sarnia with regard to lot No. 1010 in the town of Guelph; a declaration of readiness on the part of the said Company to pay some certain sum for damages likely to arise to the said lot from the exercise of the powers of the said Company under the said acts of Parliament, and mentioning the name of a person to be appointed as arbitrator of the said Company if their said offer be not accepted, on affidavits stating that said Day owned the said lot No. 1010, being on the south side of Kent street, along the centre of which street the said railway is carried, occupying thirty-four feet of the centre thereof, and elevated from three to six feet above the surface of the street, leaving only about thirty-two feet on each side, rendering it necessary to use part of the lot in addition to the said space to get into the yard of said lot; and that said Day hath sustained damage by reason thereof, such railway being carried along said street by authority of a by-law of the Municipality of the Town of Guelph. That a plan annexed shewed the track of said railway in front of and adjacent to said Day's lot. That compensation has been demanded, but the said Company refuse it, or to appoint an arbitrator &c. By the by-law referred to, passed 21st April, 1854, the said Company was empowered to carry the said railway through the town of Guelph, and through, over and along any of the streets within the same, pursuant to the said plan in all things; and that the said Kent street, from the west boundary of Glasgow street to the east boundary of York street, should be forever stopped, provided only on the following conditions: *i. e.*—that the said Company shall be responsible and liable at their own costs and charges for any damages or claims of any individuals or parties that may have lawfully arisen, or may at any time lawfully arise or be made for or by reason of the carrying of the said railroad through the said town of Guelph, whether the same be direct or otherwise; and pay the said town of Guelph £115 on the passing of such by-law. Annexed thereto is a plan and specification, shewing and describing the line and course of the said railway in passing through the said town of Guelph.

Galt shewed cause, and contended that *Day's* own case shewed he could not sustain the claim, the damages complained of being purely consequential and too remote to entitle him to compensation as injuriously affecting his land within the statute.

That the Railroad Company have acted under authority of provincial statutes and a by-law, without touching *Day's* land at all, or causing anything else as back-water &c.—*Regina v. The Eastern Counties Railway Co.* 2 R. W. Cases 736, questions Lord Denman's doctrine in *Regina v. The Eastern Counties Railway Company*, 2 Q. B. 347; *The Cast Plate Manufacturers v. Merideth*, 4 T. R. 794. He referred to the statute, 14 & 15 Vic. ch. 51, sec. 9, No. 5, sec. 12, sec. 10. Having a by-law, no case for compensation arises—sec. 8, sec. 11 (No. 5-7), No. 19. That they cannot arbitrate, no provision being made for such a case; and there is no right to take possession—*Rex v. The Liverpool and Manchester Railway Company*, 4 A. & E. 650; *Regina v. The London and Southampton R. W. Co.*, 1 R. W. Cases 717; Q. B. E. T. 1839,—the municipality authorized to act, and must be liable if any one is.

Macdonald, in reply—that the Railroad Company is liable as if the words *injuriously affected* were in the act. The Company must comply with the terms of the by-law. The statute speaks of compensation when the land may suffer damage, or may suffer damage from the exercise of any of the powers &c.

He referred to sec. 11, Nos. 7 and 19, which contain language similar, and speak of injury to land taken, or suffering damage &c. If the land taken applies to the road in this case the other alternative applies to *Day*, who is injured seriously. He referred to 14 & 15 Vic. ch. 51 sec. 4, and the subsequent act, and sec. 68. *The East and West India Docks Birmingham R. W. Co. v. Gattke*, 6 R. W. Cases, 371.—The by-law is incorporated with the statute, and both are to be taken together.

Galt said the Company are answerable to the municipality if the by-law is not complied with—not to *Day*—Sec. 1, Nos. 5 & 7.

So the question is, whether, if Day's lands are injuriously affected, in fact it forms a case entitling him to compensation under the provisions of the statute cited.—*Regina v. The Eastern Counties Railway Company*, 2 Q. B. 347, 569, S.C. 2 R. W. cases 736; *The South Staffordshire Railway Co. v. Hall* 15 Jur. 322, S.C., 3 Eng. Rep. 105; *Glover v. The North Staffordshire Railway Co.*, 16 Q. B. 923—*Law Times* 19th May, 1855, p. 106; *The Caledonia Railway Company v. Ogilvie*, 29 Eng. Rep. 22.

MAGAULAY, C. J., delivered the judgment of the court.

The provincial statute 14 & 15 Vic. ch. 51, sec. 4, enacts, that the power given by the special act to construct the railway, and to take lands for that purpose, shall be exercised subject to the provisions and restrictions contained in this act, and compensation shall be made to the owners and occupiers of, and all other parties interested in, any such land so taken or *injuriously affected* by the construction of the said railway, for the value of all damages sustained by reason of such exercise as regards *such lands* of the powers by this or the special act &c. vested in the Company.

Sec. 11, No. 5—after deposit of maps, and giving notice &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for (qu. to) the railway &c. See residue of the clause, and also sub-sections Nos. 7 & 19, and the statutes 14 & 15 Vic. ch. 73, and 16 Vic. ch. 37; the special act incorporating the Grand Trunk R. W. of Canada, and chaps. 39 & 76. The imperial statute 8 & 9 Vic. ch. 18, sec. 68, enacts that if any party shall be entitled to any compensation in respect of any lands or of any interest therein which shall have been taken for, or *injuriously affected* by, the execution or the works &c.

The case of *The Caledonia Railway Co. v. Ogilvie* (House of Lords Cases, March 30, 1855, 29 Eng. Rep. 22,) makes it a test whether the words, *injuriously affected* entitle the owner of lands to compensation in respect of any act which if done by the Railway Company without the authority of Parliament

would have entitled him to bring an action against them; and though not a universal test since the statutes may authorize what would otherwise be actionable, still it is applicable to the case before us. What the Railway Company have done was either legally authorized by the statute and by-law, or it was illegal. If illegal, or as if there had been no statute or by-law, it would be a public nuisance; and thus regarded, the applicant does not make out a case that would entitle him as a private individual to sustain an action because of the peculiar or special inconvenience experienced by him by reason of such nuisance; he was only inconvenienced like any other person, having occasion to pass that way; or, like all others who had houses, and resided in the vicinity of the street. I apprehend he could not maintain an action by reason of the inconvenience he experienced every time he went in or out of his own premises. But if he could, it is said in the above case by the Lord Chancellor it would only be a multiplication of the same damage, not a different damage; and that all attempt at arguing that it was a damage to the estate was a mere play upon words. And if it is a public nuisance, it follows that it is not a case for compensation at all events; so to treat it would be impliedly admitting its legality in itself, apart from the applicant's claim.

Then if authorized by law, the case above cited establishes, I think, that the works complained of do not injuriously affect the applicant's land within the meaning of the statute, admitting the right to compensation when lands are injuriously affected by the construction of the railway as distinguished from lands taken, or lands temporarily occupied, or soil or materials removed therefrom in the course of, and for the purpose of the work.

It follows that in either point of view this application cannot be granted.

Mandamus refused.

SMITH V. JONES.

Ship Registry Act—Sheriff's sale of vessel.

A British subject, owning a foreign-built vessel, having obtained registry of the said vessel, his interest therein was subsequently sold under a writ of *Fi. Fa.* against his goods, &c., and was conveyed to the purchaser by sheriff's deed, such deed not reciting any certificate of ownership, and not having the endorsement thereon required by the provincial statute.

Held—1st. That a bill of sale from a sheriff, conveying the interest of an execution debtor in a ship or vessel to the purchaser, without reciting the certificate of ownership, and without the endorsement on the bill of sale required by the act, is valid: 2nd. That a foreign-built ship or vessel cannot be registered in this province.

Interpleader issue to try whether the steamer *Oxford* was the property of the plaintiff or not on the 6th of June, 1855. The sheriff of Essex, under a *Fi. Fa.* against goods in the suit of Lumley v. Salmoni, seized and sold Salmoni's interest in the vessel, then lying at a wharf in Amherstburg, on the 22nd of October, 1854. Mercer bought her in for plaintiff, and the sheriff assigned to him, and he received possession on the 11th of November, 1854.

A certificate of registry, dated the 20th of April, 1854, and the sheriff's sale thereon endorsed, the 11th of June, 1855, were put in.

It was objected for defendant—First. That the recital in the sheriff's assignment shows a sale to Mercer and not plaintiff; that the sheriff could not sell to plaintiff; therefore the sale is void. Second. That the sheriff's assignment is void for not reciting the certificate of ownership. Third. The registry of such assignment on the 11th of June, 1855, is void for the same reason, and could not cut out an execution delivered on the 6th of June previous.

The first overruled, and the others reserved.

Objection to sufficiency of notice and regularity of sale also made, but given up.

Verdict for plaintiff, subject to the opinion of the court.

If valid, one point is, whether the registry of the 11th of June related back so as to supersede the execution of the 6th of June. *Quære*.—The execution did not change the property, and if Salmoni's until registration, did it then cease? The vessel was registered on the 20th of April, 1854, at the port of Amherstburg, and the certificate shows she was foreign-built and registered in the port of Miami city, State of Ohio, the 30th of July, 1848.

Leith, for plaintiff contended—First. That the assignment to plaintiff is valid, though the notice of the sale was not regular—*Doe Tiffany v. Taylor*, 6 U. C. Q. B. R. 426; *Taylor's Rep.* 496; that the provincial statute 49 Geo. III. ch. 4, sec. 5, as to notice, is only directory. Second. That the sheriff's assignment was not invalid because it omitted to recite the certificate of ownership, not being a sale *inter partes*, but under authority of law, nor by reason of its being bid off to Mercer. Third. The registry of the sheriff's assignment was not necessary, the steamboat being a foreign-built vessel; also for the reason mentioned under the second point—*Abbott on Shipping*, ch. 2, p. 58, shows the object of the registry acts. That the provincial statute 8 Vic. ch. 5, sec. 3, is not applicable to a foreign vessel. That, irrespective of the registry acts, a parol sale with delivery would be good—*Benyon v. Creswell*, 12 Q. B. 897. That if the vessel was unnecessarily registered, it is not necessary to continue it. That not being entitled to the privileges of a registered vessel, registry could not be required. That such a vessel, though foreign, may be owned by a subject. That registry is not necessary to transfer the property, and only material when the vessel is home-built, by statute law. On the objection as to want of registry, he referred to 8 Vic. ch. 5, secs. 13, 16, 18; *Hubbard v. Johnstone*, 3 Taunt. 177; *The Tremont*, 1 Rob. 163; *Bloxam v. Hubbard*, 5 East 407; S. C., 1 Smith 487; *Burnham v. Daly*, 11 U. C. Q. B. R. 211. That registry acts do not apply to sheriff's deeds, and defendant relies upon a subsequent sheriff's sale and registry cutting out the prior one to plaintiff. The certificate of ownership being in possession of the execution debtor, the plaintiff could not get it endorsed, not being under his control.

J. Wilson, for defendant, contended, referring to the Imperial statute 8 & 9 Vic. ch. 89, that the question is whether plaintiff owned the vessel on the 6th of June, 1855; and that in point of law he did not, the vessel remaining registered in *Salmoni's* name at that time. That the test is not where built, but by whom owned; and being owned by a subject, was properly registered and certified. That the two questions were—First, whether the sheriff's assignment must recite

such certificate of registry; and, second, whether the assignment itself should be registered to pass the property—*Waters v. Shade*, 2 Grant 465; *Doe dem. Brennan v. O'Neil*, 4 U. C. Q. B. R. 8. That the object is to preserve evidence of the identity of the vessel. That the description "steamer Oxford" is insufficient; that is, if the vessel and sheriff's assignment be within the registry act; and if so, insufficiency is not denied by the plaintiff—*Sherwood v. Coleman*, 6 U. C. Q. B. R. 614, 887; *Warburton v. Lovedale*, 2 D. & C., 480. That the sheriff's assignment cannot operate till registered, —*Boyson v. Gibson*, 4 C. B. 121; *McCallmant v. Rankin*, 2 DeG. McN. & G. 408; *Hughes v. Morris*, 2 *ib.* 340; *Speldt v. Lichman*, 13 Ves. 588; *Duncan v. Tindall*, 13 C. B. 250. That defendant need not prove title in himself, but the plaintiff must prove it was his on the 6th of June, the day mentioned; and it is immaterial whether the vessel was *Salmoni's* or defendant's, if not the plaintiff's.

MACAULAY, C. J.—The objection to the want of due notice of sale is met by the cases cited, the act being directory and not conditional.

The property in the vessel did not pass to Mercer without any written transfer, nor was it divested as being in *Salmoni*, the debtor, by force of the seizure and incomplete sale. It passed by the sheriff's deed of assignment, and that assignment was to the plaintiff by Mercer's direction, who may have acted as agent or broker in the purchase for plaintiff—*Giles v. Grover* (9 Bing. 159), *Doe Hughes v. Jones* (9 M. & W. 372), *Morland v. Pellatt* (8 B. & C. 722), *Higgins v. McAdam* (3 Y. & J. 13), *Stevens v. Donston* (1 B. & A. 230), *Playfair v. Musgrove* (14 M. & W. 239), *Hunter v. Parker* (7 M. & W. 322—343).

I do not think the sheriff's assignment required a recital of the certificate of ownership, of which he might be ignorant, or which he might not be able to discover; and that the sale being not by the owner, but by authority of law, the property passed without observance of the formalities required in sales by the owners themselves—*Bloxam v. Hubbard* (5 East. 407, S. C. 1 Smith 487), *The Tremont* (1 Rob. 163, 1843), Dig. P. 223.

With respect to the necessity of obtaining registration and endorsement of the sheriff's assignment, the same answer may be given, and the propriety of a registration *de novo* would depend upon peculiar circumstances. It is said of the earlier registry acts that they did not apply to foreign-built vessels, and the statute 8 Vic. ch. 5 does not include them.

Benyon v. Creswell (12 Q. B. 899) shows that the registry of a foreign-built vessel, if not authorized or necessary, would not require to be adhered to in subsequent transfers. The statute 8 Vic. ch. 5, sec. 3, provides that no certificate of ownership shall be granted to any ship or vessel not wholly built in this province, and which shall not wholly belong, and continue to wholly belong, to her Majesty's subjects.

Sec. 2, which gives the form of the certificate of ownership, and sec. 6, which prescribes the declaration thereof, are framed accordingly. Secs. 13 & 16 relate to sales by the owners themselves; and sec. 17, at the end, seems to show that the sheriff's assignment, if necessary and properly done, having been registered on the 11th of June, 1855, before any subsequent sale by *Salmoni*, or under any other execution, relates back to the original sale and confirms it, to the exclusion of the execution previously received on the 6th day of the same month of June—*Bloxam v. Hubbard* (5 East, 407), *Doe dem. Brennan v. O'Neil* (4 U. C. Q. B. R. 8), *Burnham v. Daly* (11 U. C. Q. B. R. 211), *Benyon v. Creswell* (12 Q. B. 899).

The defendant, in effect, contends that the execution of the 6th of June, although not executed, was, while *in fieri*, better than the former execution, executed by a sale and assignment under it; at all events, that the possession in the vessel did not pass by virtue of the sale that was made.

The Imperial statute 17 & 18 Vic. ch. 104, sec. 37, No. 2, p. 19, passed 31st January, 1854, to operate from the 1st of May, 1855, shows that foreign-built vessels can only be owned and registered by British subjects, and if in force here, it did not operate when *Salmoni* was registered as owner on the 20th of April, 1854, although it did so on the 6th and 11th of June, 1855. Section 55 of that act relates to transfers by owners, and section 58 as to transfers by other lawful

means. See also schedule B. p. 209, and schedule H. p. 221; also Imperial statute 17 & 18 Vic. ch. 120, p. 243; 8 & 9 Vic. ch. 93, sec. 44, passed 4th of August, 1845; 12 & 13 Vic. ch. 29, sec. 1, passed 26th of June, 1849.

The question is, not whether the vessel is entitled to the privileges of a British ship, but whether the right of property therein passed by the sheriff's deed. Unless some other Imperial act in force here before the 17 & 18 Vic. ch. 104 authorized and required the registry of foreign-built vessels, the provincial statute 8 Vic. ch. 5 did not, and the registry of the 20th of April, 1854, in Salmoni's name, would be of no force; and, rejecting it, I find no authority for holding that the property in a foreign-built vessel would not pass by the sheriff's sale that was made so as to transfer a good title to the purchaser without registration of the sheriff's assignment, although since the 17 & 18 Vic. ch. 104; and so far as that statute is concerned, the plaintiff's title does not seem to have been registered with the necessary specification.

The Imperial statutes previous to the 17 & 18 Vic. ch. 104, in the first instance, (8 & 9 Vic. ch. 93, sec. 44,) enacted that no vessel or boat shall be admitted to be a British vessel or boat on any of the inland waters or lakes of America, except such as shall have been built at some place within the British dominions, and shall be wholly owned by British subjects, &c. The 12 & 13 Vic. ch. 29, sec. 1, enacted that so much of the above act as provides that no vessel or boat shall be admitted to be a British vessel or boat on any of the inland waters or lakes of America, except such as shall have been built at some place within the British dominions, &c., be repealed. It would seem to follow from this that a foreign-built vessel owned by subjects might be registered and become entitled to the privileges of home built-vessels; but the provincial statute 8 Vic. ch. 5 does not authorize the registry of foreign-built vessels, and no act, Imperial or Colonial, is referred to that does; if not, then the registry at Amherstburg was invalid, and the vessel remained a foreign-built vessel, owned by Salmoni at the time of the seizure and sale; and if so, such sale passed the property therein.

MCLEAN, J. and RICHARDS, J., concurred.—Rule discharged.

MC CONKEY v. GORRIE.

Liability as carrier.

Fifty barrels of oysters having been shipped at Oswego for Toronto per defendant's vessel, the "Junius," and the vessel having been obliged by stress of weather to go to Kingston, from which latter port the goods were transhipped for Toronto per the steamer "Oshawa," where they arrived in an injured condition.

Held, that the defendant was the carrier throughout—that is, from Oswego to Toronto via Kingston.

Declaration states that plaintiff, at defendant's request, shipped on board a vessel called the 'Junius,' at Oswego, of which vessel defendant was the owner, fifty barrels of oysters in good order, to be taken care of and securely carried to Toronto, and to be there safely delivered in like good order to the plaintiff, &c. Yet defendant, &c., not regarding, &c., so carelessly and negligently behaved and conducted himself with respect to the said goods, that by and through the negligence and improper conduct of defendant and his servants &c., the said goods were wholly lost to the plaintiff &c.

Pleas—First. Non assumpsit.

Second.—That the plaintiff did not deliver the said goods to defendant for the purpose and on the terms in the declaration mentioned.

Third.—That he did not receive the said goods on such terms, &c.

Fourth.—That defendant did take care of and safely and securely convey, from Oswego to Toronto aforesaid, and deliver the said goods for the plaintiff, according to his said promise.

Fifth.—That said goods were not lost to plaintiff by the carelessness &c., of defendant or his servants, &c.

The case was tried before the Chief Justice, at the last assizes for the United Counties of York and Peel, when it appeared in evidence: that the said goods were shipped on board the vessel and stowed under hatches three or four days before she sailed; that she left the port in the end of November for Toronto, but was compelled by stress of weather to take refuge in South Bay, from whence she set sail on the 1st of December, but was obliged to put about for South Bay again, but got on a reef of rocks during a snow storm, where she remained until next afternoon; when, having jettisoned part of her

cargo, she got off and reached first South Bay and afterwards Kingston, the oysters being all the time in her hold.

About the 14th of December, the oysters were shipped on board the steamer "Oshawa," to be carried to Toronto, consigned to defendant, which she reached on Saturday evening, the 16th of December. On Sunday it snowed, and the master stated that on Monday he could not get to the wharf. The oysters were this day taken from below and part of them landed, and the remainder of them left on deck and landed the next day.

It was admitted that the plaintiff knew of the arrival of the oysters in the port of Toronto on Monday the 18th; and on the 20th he wrote to the defendant, that, from the course pursued in forwarding the goods, and his negligence as a carrier, he should decline interfering with them, but would look to him for the value and loss sustained by deviation from instructions and exposure of the goods to the weather, by which they were lost, being perishable. It appeared that oysters in the shell, as these were, were liable to serious injury by freezing, especially if allowed to thaw and then freeze again; and that in all probability these had been frozen more than once.

The jury found for the plaintiff, with £50 damages.

Hagarty, Q. C., for defendant, obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, the verdict being against law and evidence, and for misdirection.

J. Boulton shewed cause.

MACAULAY, C. J., delivered the judgment of the court.

I am not able to discover that any other authority conflicts with the law as laid down in *Shipton v. Thornton* (9 A. & E. 314), according to which the defendant is to be regarded as the carrier throughout—*i. e.*, from Oswego to Toronto via Kingston, including the transhipment. The law is laid down in terms similar to *Shipton v. Thornton*, in *Angell on Carriers*, sec. 127, and in 1 *Arnould*, 185; and I find no authority for holding the defendant absolved from his obligations as carrier either by reason of what occurred at Kingston, or of the tran-

shipment. The goods were *in transitu* from Oswego to Toronto, and in the defendant's hands as carrier, until finally delivered at Toronto. Analogous cases have arisen under contracts to carry goods by railroad by different lines in succession, which lines were possessed and worked by different and independent owners. *Muschamp v. The Lancaster R. W. Co.* (8 M. & W. 421), *Scothorn v. The S. Staffordshire R. W. Co.* (8 Ex. R. 311), *Watson v. The Ambergate R. W. Co.* (15 Jur. 448). The expediency of the rule appears in this case, as in those, from the difficulty of determining when and where the goods received damage, and the impossibility of the plaintiffs proving it—*Story on Contracts*, S. 374 A. B.; *Wilson v. The Royal Exchange Assurance Co.* (2 Camp. 623). I think, however, there should be a new trial on the merits, on payments of costs. The plaintiff shipped the oysters late in the autumn at Oswego, and at a season when injury by frost was likely to be sustained. I am not satisfied that the carrier is fairly and justly liable for the injury sustained by frost, and no other injury or negligence is complained of. That the weather throughout the passage was cold and boisterous is very clear; but when or where the oysters became frozen is uncertain, and it is likewise uncertain whether such freezing is to be attributed to the neglect of the carrier or to exigencies beyond his control. It has proved an unfortunate adventure; one of two innocent parties must suffer. A safe insurance might have covered the loss; but if there was no insurance, and the loss must fall on the plaintiff or defendant, I think the case should be submitted to another jury before such loss is visited on the defendant.

Per Cur.—Rule absolute.

BARCLAY V. THE MUNICIPALITY OF THE TOWNSHIP OF
DARLINGTON.

Municipal Council—Notice to—By-law.

A Municipal Council of a township is entitled to one month's notice of action under the statute 14 & 15 Vic. ch. 54, sec. 2, and 12 Vic ch. 10, sec. 5. If a by-law be not void on the face of it without being quashed, all proceedings duly had under it while it remained in force may be justified under it.

Writ issued July 29, 1854. Declaration, Sept. 15, 1854.

Trespass, *quare clausum et domum fregit*, being on lot No 19, 7th concession Darlington, and taking the plaintiff's goods, and converting them, &c.

Plea—Not guilty, by statute.

It appeared in evidence that the trespass complained of consisted of the seizure and sale of goods of the plaintiff, in November 1853, under two distress warrants issued by the reeve of the township, to enforce two convictions of the plaintiff in certain penalties for selling spirituous liquors by retail without a license, and contrary to the by-laws of the municipality—meaning a by-law passed the 7th of February, 1853, prohibiting the keeping open a house for the sale of spirituous liquors, &c., by retail, &c., or to be drank therein after the 1st of March then next, under certain penalties therein declared: that in Michaelmas Term (November 1853) a rule was issued by the Court of Queen's Bench, calling on the defendants to shew cause why said by-law should not be quashed. After which—that is, in December, 1853—the defendants repealed such by-law before the rule *Nisi* was answered, and afterwards shewed such repeal as cause against the said rule being made absolute; and on the 2nd of February, 1855, the rule was discharged on that ground, but with costs to be paid by the defendants.

The by-law is to prohibit the opening of any houses for the retail of wines or spirituous liquors, ale, cider or intoxicating beer, in the township of Darlington, and for other purposes therein mentioned; passed 7th February, 1853. It recited the expediency of prohibiting the licensing or opening of any houses of public entertainment for the sale of wines or spirituous liquors, ale, cider or intoxicating beer, within the limits of the said township; and enacted, that if any person should open or continue to keep open a house for the sale of wines or spirituous liquors, ale, cider or intoxicating beer, by retail, or to be drank therein, within the limits of the said Municipality after the 1st of March next, he or they should, upon conviction thereof before the town reeve, or any one or more justices of the peace having jurisdiction in the said Municipality, upon the oath of one or more witnesses, or upon the confession of the party charged, forfeit and pay a sum not less than £2,

nor more than £5 for each and every offence, &c., with costs of prosecution.

Second. That all penalties and costs, or both, imposed by that by-law, should be levied and collected as provided by the 6 Wm. IV. ch. 4; and in case no distress sufficient to satisfy the amount of penalty or costs, or both, should be found, it should and might be lawful for the town reeve or justice before whom the complaint should be made, to commit the offender to the county gaol for any time not exceeding twenty days, unless the penalty and costs should be sooner paid; which penalties, when received, should be paid as the law directed.

Third. Is to punish in like manner evasive indirect sales.

Fourth. Repealed by-law No. 16, for limiting the number of houses of public entertainment in the said township, &c., and other by-laws inconsistent with this by-law.

On the 24th of September, 1853, Mr. Jones, township reeve, issued two summonses to plaintiff to answer for selling spirituous liquors by retail without being licensed so to do, and contrary to the by-law of the Municipality; one summons charging him with having done so on or about the 8th or 9th of September, the other on or about the 8th, 13th and 31st of August, 1853, at Darlington, &c.

On the 3rd of October, 1853, the said reeve issued two warrants to Coleman, constable of the township, reciting plaintiff's conviction on the foregoing charge. One alleged, on or about the 31st of August, 1853, and the other on the 9th of September, 1853, contrary to the by-laws of said township; whereby he had forfeited £5 over and above costs and charges (in each case); such costs being £3 7s. 3d. and £2 7s. 9d. respectively, making together £8 7s. 3d. and £7 7s. 9d.; and the constable was commanded forthwith to levy the same of the goods of the plaintiff, and sell the same in eight days, if the amount and costs of distress were not paid, &c.

In November 1853 the goods were seized, and afterwards sold, &c.

In December 1853 the by-law was repealed.

On 28th February, 1853, a rule *Nisi* to quash the said by-law, granted in Michaelmas Term (1854), was discharged, on payment of costs of the application.

The jury found a verdict for plaintiff.

This is a rule upon the plaintiff to shew cause why such verdict should not be set aside as against law and evidence, and for misdirection and excessive damages, or to enter a verdict for defendants pursuant to leave reserved.

Robinson, C., shewed cause.

Vankoughnet, P., Q. C., supported the rule.

The points made at the argument were—First. Whether trespass will lie against defendants for the act complained of, the by-law not being quashed—In *Re Barclay and The Municipal Council of Darlington*, 11 U. C. Q. B. R. 470.

Second. Whether defendants were not entitled to notice of action, and whether it is not too late—*Ba. Ab. Trespass, E. 2.*; *Kerrison v. Cole*, 8 East 230, Com. Dig.

Whether the by-law, until repealed, did not protect all acting under it.

Whether the damages were not excessive, the goods having been bought in for plaintiff.

The court at liberty to refer to the report of the case of *Barclay v. Municipal Council of Darlington*, 11 U. C. Q. B. R. 470, as respects both fact and law in its application to this case.

MACAULAY, C. J., delivered the judgment of the court.

The 12 Vic. ch. 81, sec. 155, provided for quashing by-laws in the whole or in part illegal, and enacted that no action should be sustained for or by reason of anything legally authorized to be done under such by-laws, unless such by-law, or the part thereof under which the same should be done, should be quashed (in manner therein provided) one calendar month previously to the bringing such action; and if such corporation, or any person sued for acting under such by-law, should cause amends to be tendered to the plaintiff or his attorney, and upon such tender being pleaded, no more than the amends tendered should be recovered, the court should award no costs to plaintiff, but to award costs to the defendant, to be deducted out of the amount of the verdict.

The 14 & 15 Vic. ch. 109, sec. 35, enacted that whenever any by-law, order and resolution shall be or has been adopted

by any municipality whatever, and such by-law, order or resolution has been or shall be quashed, or declared illegal or void by any court having competent jurisdiction therein, the municipality by which such by-law, order or resolution has been or shall be passed shall alone be responsible in damages for any act or acts done or committed under such by-law, order or resolution; and any clerk, constable or other officer acting thereunder shall be freed and discharged from any action or cause of action which shall accrue or may have accrued to any person or persons by reason of said by-law being illegal and void, or having been quashed; and such municipality shall pay all costs and expenses attending the quashing of any such by-law, &c. Section A. of the same act, number twenty-one, substituted a clause in lieu of section 155 of 12 Vic. ch. 81, providing for the quashing of by-laws illegal wholly or in part, and enacted that no action should be sustained for or by reason of anything required to be done under any such by-law, unless such by-law or the part thereof under which the same shall be done shall be quashed in manner aforesaid one calendar month at least previous to the bringing such action; and if such corporation, or any person sued for acting under such by-law, shall cause amends to be tendered to the plaintiff or his attorney, and upon such tender being pleaded, no more than the amends tendered shall be recovered, it shall be lawful for the court to award no costs in favor of the plaintiff, and to award costs in favor of the defendant, and to adjudge the same to be deducted out of the amount of the verdict, &c.

The 12 Vic. ch. 81, sec. 185, provided for recovering penalties, &c., for the punishment of persons offending against by-laws.

The 6 Wm IV. ch. 3, sec. 4, provided for enforcing penalties against persons selling spirituous liquors without a license. The 12 Vic. ch. 81, sec. 31, No. 14, and the 13 & 14 Vic. ch. 65, amended the laws relative to tavern licenses. The 14 & 15 Vic. ch. 120, amended the last mentioned act, and declared the 7th & 8th sections of 6 Wm. IV. ch. 4, continued and in force.

The 14 & 15 Vic. ch. 54, amended the laws affording pro-

tection to magistrates and others in the performance of public duties; and enacted, sec. two, that no writ should be sued out against any justice of the peace, or other officer or *person* fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law or is imposed by act of parliament, imperial or provincial, unless notice in writing be given, &c., at least one calendar month before suing out the writ, &c. Sec. three provided for the tender of amends within one calendar month after service of such notice; and if not accepted, that such tender may be pleaded in bar, together with not guilty, or any other plea; and if the jury find such tender sufficient, they shall find for defendant, but if insufficient or no tender made, and the other pleas be found for plaintiff, the jury shall give damages and the plaintiff recover the same, with costs. Section five authorizes the general issue to be pleaded, and the special matter to be given in evidence under it. Section six authorizes the payment of money into court to be specially pleaded, &c. Section eight limits actions for anything done, &c., to six months after the act committed. Section nine limits the act to justices, officers and other persons acting as aforesaid only; and so acting *bonâ fide* in the exercise of their duty, though they should exceed their powers or jurisdiction, and have acted clearly contrary to law.—See 16 Vic. ch. 178, sec. 26, and ch. 180, secs. 8, 9, 10.

12 Vic. ch. 10, sec. 5, No. 8, enacted that the word *person* should include any body corporate or politic, and to whom the context can apply, &c., and see 7 Wm. IV. ch. 14, sec. 2.—*Brown v. The Municipality of Sarnia* (11 U. C. Q.B.R. 215), *Barclay v. The Municipal Council of Darlington* (11 U. C. Q. B. R. 470), and 16 Vic. ch. 184 (14th June, 1853), further defined the powers of municipal councils to make by-laws. Section three, No. 2, for regulating the sale of intoxicating liquors by retail. Section four is for prohibiting the sale thereof under 18 & 14 Vic. ch. 65, and requiring a public vote to authorize such prohibition.

This is not a case in which the by-law has been quashed under the statutes, nor is the action brought against the clerk, constable or other officer having acted thereunder. The

reason expressed in *Reid v. The City of Hamilton*, it still appears to me that the facts permit a case being brought against the defendants within the spirit and meaning of the 54th chap., and that the argument is cogent and prevailing, and that they are entitled to the protection afforded thereby. If so, the action is too late, and the delay was the plaintiff's own delay; and if not, a month's notice of action ought to have been given. I may further remark in relation to the merits, that admitting the illegality of the by-law, that did not authorize the plaintiff to sell spirituous liquors by retail without a license. A by-law illegally prohibiting the sale at all could not warrant the sale without a license, if in the absence of such by-law a license would be necessary—6 Wm. IV. ch. 4, sec. 2, and previous acts, including the Imperial statute 14 Geo. III. ch. 88, and the provincial statute 33 Geo. III. ch. 15, and 12 Vic. ch. 81, sec. 31, No. 14; 13 & 14 Vic. ch. 65, sec. 4, and proviso at the end thereof.

It does not appear that a previous valid by-law under the last mentioned act and section did not exist; if not, it did not follow that the previous statutes had ceased to operate. As to the power to issue licenses, see secs. 5 and 9, and 16 Vic. ch. 184, sec. 5.

The plaintiff was convicted for selling spirituous liquors without license; and for all that appears, he might have been rightly so convicted; in which event the conviction and warrants would be only exceptionable as wanting in due form of law, and perhaps as being for too small penalties. But in that event the plaintiff's remedy would be against the convicting magistrate, for acting under the statutes without duly conforming to the requirements thereof. And if so, he would be clearly entitled to notice, and the action is too late under the 14 & 15 Vic. ch. 54. So that in any point of view it appears to me the rule should be made absolute for a new trial, without costs.

Per Cur.—Rule absolute.

SANDERS V. BABY.

Consideration—Failure.

By agreement of 18th June, 1847, under seal, defendant agreed to sell to plaintiff the nett profits for two years from the date of the agreement, out of certain shares in the Lake Huron and St. Mary's River Mining Company, for £375.

On the 25th of November, 1847, the Lake Huron and St. Mary's River Mining Company, through their president, directors and trustees, or other duly authorized officers, sold and assigned to the Montreal Mining Company certain tracts of land therein described, and all tools, engines &c., for £33,250; to which sale defendant assented.

Held, That the defendant having disposed of his stock which represented his interest in the mines, before the arrival of the period at which he was to sell the profits to the plaintiff, he placed it out of his power to fulfil his agreement and so broke his contract, and that plaintiff became immediately entitled to sue for the breach thereof upon the ground that the contract was at an end, and that the consideration had failed.

First count on special sealed agreement, 18th June, 1847, whereby defendant agreed to sell to plaintiff the nett profits for two years from date, out of 1500 shares of the Lake Huron and St. Mary's River Mining Company, for £375. Alleges £1500 profits.

Second—Money had and received.

Third—Interest.

Fourth—Account stated.

Pleas—To first count. *Non est factum.*

To second count. That no such profits accrued, or were paid to defendant.

To second, third and fourth counts. Never indebted.

The agreement is that defendant shall sell to plaintiff all the nett profits arising on 500 shares of the Lake Huron and St. Mary's River Mining Company, which may be divided or in hand for two years from date, 18th of June, 1847, for £375, to be paid as follows: £12 10s. down, (admitted) £112 on or before the 18th of July then next, £125 on or before the 18th of August then next, and £125 on or before the 18th of September then next. Two drafts of defendant on plaintiff dated the 18th of June, 1847, for £112, at 30 days, and £125 at 60 days were produced, accepted by plaintiff and paid. It was proved that there had been no profits; none ever on hand or divided.

Also, that by notarial instrument, executed in Montreal, L. C., the 25th of November, 1847, The Huron and St.

Mary's Copper Company and Lake Huron and St. Mary's River Mining Company, through their president, directors and trustees, or duly authorized officers, sold and assigned to the Montreal Mining Company certain tracts of lands therein described, known as the Bruce Mines, &c., and all their tools, engines, boats and provisions without exception, with covenant for good right to convey. The consideration for which was £33,250, payable thus: £15,000 as follows, £6750 on demand, £3000 in three months, £3000 in six months and £2250 in nine months, to be paid to such members of the company as the parties thereto selling should indicate in writing. The remainder, being £18,250, as follows: to A. Rankin £15,000, by six annual instalments of £2500 each; the first on the 1st of March, 1849, and £3250 to John Keating. The parties receiving such money to produce and deliver up certificates for stock as therein provided.

The Montreal Mining Company, to increase its stock and allot to the parties of the second part 14,200 shares of the stock of the said company so increased, to be issued to them and their successors, twelve shillings and sixpence a share to be considered paid in, being the amount paid upon the old stock. It would seem that twelve and sixpence was paid, and one pound ten shillings received for the stock, if so—query as profit—plaintiff held 3000 shares, and assented to the sale as well as defendant.

Verdict for defendant.

Leave to move to enter it for plaintiff on the common counts (as upon a failure of consideration, or by reason of defendant having disabled plaintiff's receiving any profits) for £371 15s., or to move against the verdict on the first count if profits (query any profits) accrued from the Montreal Mining Company.

A. Prince obtained a rule *Nisi*.

O' Connor shewed cause.

MACAULAY, C. J., delivered the judgment of the court.

The first count of the declaration not only affirms the covenant as still subsisting, but affirms the sale of the stock and claims the profit thereon as accrued within the meaning

of the sealed contract, whereas the count for money had and received dis-affirms both and treats the special agreement as rescinded and at an end.

I am not satisfied that the one pound ten shillings a share, to be received by certain stockholders from the Montreal Company, was in fact received by defendant on 500 shares, or if received that it was nett profit, or that defendant received that sum upon the 500 shares. I am disposed to think that the nett profit contemplated by the agreement was profit arising from the working of the mines and accruing to the defendant as a stockholder in respect of his stock as the source of profit, such stock being still retained by him. This view is strengthened by what follows,—“*which may be divided or in hand*”—meaning dividends or profits in the hands of the company or directors to be divided among the shareholders. It is by no means clear to me that a profit arising from a sale of the stock is not included as being the only profit that could accrue under such circumstances; at all events in my opinion, when the defendant disposed of his stock which represented his interest in the mines—that is, disposed of the *corpus* whereon annual profit was expected to accrue, and so disposed of it before the arrival of the period at which he was bound to sell the profits to plaintiff if there were any—he thereby put it out of his power to fulfil his agreement and broke his contract. The contract involved an implied undertaking that defendant would continue to retain and hold the stock for the two years mentioned in the agreement, and not having done so, he by his own act disabled himself from selling any future profits to the plaintiff; because they would accrue to and belong to another—namely, his assignee, and he could not sell the same to the plaintiff, not being his to sell. It is not sufficient to say he could pay plaintiff an equal amount, that would not be selling the profit, but paying an equivalent. Moreover the defendant not only sold the stock, but it was transferred under an arrangement that merged it in another company. The *corpus* or estate, real and personal, of the mines, &c., was transferred to the other company and the stock merged in that company, the stock of which last company was ex-

tended and taken in lieu of the merged stock, and after that it could not be known whether the Bruce Mines would have yielded a profit or not had it continued separate, and been managed by others than those into whose hands they passed; the defendant having therefore put it out of his power to perform his covenant with plaintiff, the plaintiff became immediately entitled to sue for the breach thereof, or to recover back the money he had paid, upon the grounds that the contract was (at his election) at an end, and that the consideration he had paid entirely failed by reason of the defendant's act. I see no reason at present why the plaintiff might not sue in covenant, alleging for breach the defendant's assignment of the stock before it could be known whether there would be any profits or not, and such action be brought forthwith without waiting the expiration of the two years to determine in the result what the plaintiff's damages were. To the extent of the consideration paid I am disposed to think he had a right to reimbursement to recover damages to that amount, irrespective of the contingency of future profits arising from the mines to the new stockholders. It is not now a question whether had there been profits exceeding the consideration, the plaintiff would be entitled thereto as damages. The defendant having put it out of his power to perform his covenant, the plaintiff would seem entitled to recover his money back in some form of action; for the defendant could have no right to retain the consideration paid after such a breach of agreement. Then can the plaintiff recover back the consideration in debt for money had and received? The objection to it is that the contract being under seal and a specialty, it affords a remedy of a higher nature, and the plaintiff cannot rescind it by act *in pais*. The cases of *Greville v. De Costa* (Peak's Additional Cases 113), and *English v. Blundell* (8 C. & P. 332,) are in favor of the right, however inconsistent with the general rule that a sealed agreement cannot be affected by collateral parol promises, expressed or implied by law. Both, however, proceeded on the ground of the plaintiff's right to rescind the contract. Now here the defendant's sale of the stock in effect causes a total failure of consideration; and I think the plaintiff became entitled to

recover back the amount he had paid as damages in a count founded upon the contract. The plaintiff has declared upon it, and therefore treated it as still subsisting, which is inconsistent with its being rescinded, even if he had a right to rescind it. Under an amended count I think he might recover; and there are cases to shew that in such circumstances a new trial will not be granted where the merits are with the plaintiff, and the amount of the verdict not more than he could recover in the same action under a count differently framed. The verdict is, however, for the defendant; and we are asked to enter it for plaintiff. If it was a condition implied that the defendant should retain the stock during the two years, in default or breach of which the plaintiff might rescind the agreement, he should have made his election and framed his declaration as upon simple contract to recover back the money paid, abandoning the contract under seal, otherwise than as it might be used in evidence. But instead of that, he has affirmed it and declared upon it; claiming profits. In this state of the pleadings, I do not think we are at liberty to enter a verdict for plaintiff on the count for money had and received; but think a new trial should be granted on payment of costs, with leave the plaintiff to add another count on the contract.

Per Cur.—Rule absolute for a new trial.

ORCHARD V. ÆTNA INSURANCE COMPANY.

Freight—Insurable interest in.

A party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel.

This is an action upon a policy of insurance upon the freight of a vessel or schooner called the "Ocean," alleging the loss of the vessel by fire. The policy, dated 11th October, is by defendants on account of Captain W. H. Fellowes. Defendants insured, and caused \$1200 to be insured, lost or not lost, at and from the port of Toronto to Goderich and Owen Sound on the following, viz:—Freight only to the amount of one thousand six hundred dollars (\$1600), per

schooner "Ocean," Captain W. H. Fellowes commander, in case of loss to be paid to T. C. Orchard, Esq., Toronto, with leave to proceed and sail to, touch and stay at any port or place, if thereto obliged by stress of weather or other unavoidable accident—goods valued at £6000, usual conditions in print, &c.

Defendants pleaded—First. Non-assumpsit. Second. The vessel was unseaworthy at the commencement of the risk. Third. Denied the loss as alleged. Fourth. Deviation. Fifth. Unreasonable delay at Port Dalhousie. Sixth. Same as fifth. Seventh. Denies plaintiff's interest in the freight of the goods shipped and on board of said vessel, *modo et formâ*. Eighth. Barratry. Ninth. Robbery. Tenth. Want of ordinary care. Eleventh. Unseaworthy, and not properly manned and found, &c.

Replication takes issue on all the pleas.

At the trial the plaintiff produced the policy, bearing date the 11th of October, 1854, which was admitted. But the defendants' counsel objected that the only evidence of an insurable interest in the freight was the ship's registry; and leave to move a nonsuit on that point was reserved.—The case proceeded. It was then proved that the crew of the vessel would not leave the port of Toronto without being paid: that the plaintiff advanced monies on security of the freight, and the bills of lading were made out payable to him by the direction of Captain Fellowes, the total amount thereof being £313 13s. 9d. The plaintiff advanced £100 to him, and accepted orders for about £150; in all £250, upon condition that his name should be put in the policy; and the defendants' agent was informed of the plaintiff's being interested at the time the policy was effected. It appeared that the vessel was at that time lying in the port of Toronto, at which place she had been loaded for Goderich and Owen Sound, on lake Huron. No registry was proved. Fellowes stated that she was not registered in his name; but that he held a bond for a deed. The vessel left Toronto on the 13th of October (query, 14th), and arrived at port Dalhousie the same afternoon, a person named Rea being placed in command of her, and Fellowes remaining behind: that the

crew consisted of such master, a mate, two able seamen and two landsmen hired to pump her: that she was leaky at starting, and in other respects not in perfect sailing order: that the master had indulged in drinking on the way over; and that on reaching port Dalhousie she was not well taken care of: that the master continued intemperate; the mate deserted her, and the two landsmen returned to Toronto: that she was not reported to the collector of canal-tolls until Monday morning, the 16th of October; and the master had not funds to pay the canal-tolls. He presented a letter from Fellowes (not produced), and was told to pass the lock, the collector promising to see what he could do: that he did not proceed, and on Tuesday morning the vessel was destroyed by fire in Port Dalhousie: that such fire arose from gross carelessness, if nothing worse; and she was in all respects greatly neglected while at Port Dalhousie: that other vessels proceeded up the canal on Saturday afternoon, and the "Ocean" might have done so had due diligence been used and the master been provided with means to defray the tolls; but that she was unnecessarily delayed, and without being detained for purposes connected with the voyage.

It was objected for the defendants, that neither the plaintiff nor Fellowes had any insurable interest in the freight, and that the plaintiff cannot maintain this action. Leave to move a nonsuit on this point was reserved, and the case proceeded.

The jury found for the plaintiff on all the issues, except the fifth and sixth, with £300 damages; and for the defendants on the fifth and sixth issues.

Cross rules were obtained—First. For the plaintiff, to set aside the verdict as to the fifth and sixth issues, as being against law and evidence, or for judgment *non obstante*. Second. For defendant, to set aside the verdict as to all the issues, except the fifth and sixth; and to enter a nonsuit on leave reserved at *Nisi Prius*, or for a new trial, on the ground that the issues found for the plaintiff are against law and evidence, and the discovery of new evidence.

Richards, for defendants, shewed cause and contended, first, against the plaintiff's rule—That unreasonable delay was a deviation; it enhanced the risk daily, and extended

construction can, I think, only mean to be paid to him as agent or on behalf of Fellowes, and not as being himself the party insured. Then, to sustain the action in respect of his interest in the subject matter, the plaintiff must shew that he had an insurable interest in the freight. He does not shew that he possessed such an interest as owner of the vessel; and the only other way by which he could have acquired an insurable interest therein would be by proving that as shipper or owner of the goods he had advanced the whole or a portion of the freight, as freight, to the owner or charterer of the vessel in anticipation of its being earned, but before it was earned; and that such advances were made strictly on account of and in part payment of the freight expected to be earned and to become due, and without recourse against the owner or charterer of the vessel personally. It must bear analogy to *bottomry* or *respondentia loans*, in which the advance is put in hazard and risked upon the success of the adventure or expected voyage. Here the plaintiff was not owner of either the vessel or goods; nor did he ship the goods as shipper or carrier.

It is reduced then to the question, whether a stranger in point of interest to both the vessel and goods may nevertheless advance to the owner of the vessel part or all of the expected freight, so as to acquire a right thereto and an insurable interest therein. If he could, then it is contended that the bills of lading were in this case made out in the plaintiff's name or favor; that is, that they entitled him to call upon the consignees to pay and to receive payment of the freight when earned. But even in this point of view he would be obliged to establish, not a loan or a mere advance of money on security of the freight, but such an advance in respect of the anticipated freight and in reliance upon such freight, exclusive of any personal recourse against Fellowes or the ship-owner for reimbursement: and it is said the plaintiff's advances were made on *security of the freight*; but that rather imports a loan, with a claim to the freight as collateral security, than an advance in respect of the freight itself; and such I think the only construction of which the terms of the policy and the bills of lading, so far as explained (for none

were produced at the trial), are fairly susceptible.—Camden et al. v. Anderson (5 T. R. 709), Stainbank et al. v. Fenning (11 C. B. 51), Stainbank et al. v. Shipard (13 C. B. 418), Hall v. Jansen (29 Eng. Rep. 111), Moorsom v. Greaves et al. (2 Camp. 627), Arnould 229, 235, 260, sec. 105; Garrett v. Handley (4 B. & C. 666), Manfield et al. v. Maitland (4 B. & A. 582-5), Sutherland et al. v. Pratt et al. (12 M. & W. 16), Camden et al. v. Anderson (1 B. & P. 272), Lucena v. Craufurd et al. (3 B. & P. 95), Marsh v. Robinson (4 Esp. 98).

See Arnould, page 232, sec. 105.—It is said that in order to give an insurable interest in freight there must be, first, a title either legal or equitable in the party insuring subsisting at the time of loss in the subject, out of the ownership of which the right to freight accrues—i. e., the ship; or, second, an inchoate right to the freight, &c—Wilson v. The Royal Exchange Assurance Company (2 Camp. 626). Plaintiff also declared upon another policy on £300 lent to the captain, payable out of the freight. But Lord Ellenborough held that this was not an insurable interest; and the policy being illegal on the face of it, the premium could not be recovered back—Webster v. De Taste (7 T. R. 157).

The case in 2 Camp. 626 is like the present, except that it does not appear here, as it did there, that the plaintiff paid the premium, or that he is the person named in the policy as the insured. The policy on the face of it implies that Fellowes paid it, and is the party insured. The only view I feel warranted in adopting is, that the advance made by the plaintiff was in the nature of a loan to Captain Fellowes, payable out of, or secured upon, the freight through the medium of the bills of lading, and not an advance in part payment of the freight itself and in satisfaction of such freight *pro tanto*; although, had the freight been earned, and the plaintiff received it, he might have retained the same in satisfaction of his advances, as he might have done with the proceeds of the policy had the defendants paid him the amount thereof according to the provision in the policy in that behalf. On the legal ground, therefore, that being a stranger to the property in both the vessel and goods the plaintiff could not create an insurable interest in the freight by spontaneously advancing the amount to the

master or owner of the vessel, and on the ground that in point of fact the advance made was by way of loan to him, and not in part payment of the expected freight, without personal recourse, against Captain Fellowes, I think the action fails, and that we have no alternative but to make absolute the rule for setting aside the verdict and nonsuiting the plaintiff.

The result of the cases as to the plaintiff seems to be, that, as he neither owned the vessel nor goods, and would not have been liable to pay the freight had it been earned, either as consignor or consignee, he had no insurable interest in such freight. It does not follow that Fellowes, as legal or equitable owner of the vessel, may not enforce the policy for the plaintiff's benefit or as trustee for the benefit of the owner; or, if he cannot, that the registered or legal owner may not adopt and enforce such policy for the benefit of himself nominally, but of the plaintiff and Fellowes really; for if the freight had been earned it must have legally belonged to some one; and the vessel having been lost before it was earned, the amount insured in respect of such loss ought to belong to and be recoverable by some one, so far as the mere contract of insurance goes, if the other difficulties in the way of a recovery can be got over.

Per Cur.—Rule absolute for nonsuit.

MOORE V. KIRKLAND.

Stockholder—Railway.

In an action of debt, under the 19th section of the statute 14 & 15 Vic. ch. 51, against defendant as a stockholder of the Buffalo, Brantford and Goderich Railway Company, it is incumbent upon plaintiff to shew an execution against the company returned unsatisfied, and that it was not in plaintiff's power by any reasonable exertion to have obtained satisfaction.

Held, also, that the making of calls by the directors is not a condition precedent to the plaintiff's right to recover, and that the remedy given by the statute may be pursued by a single creditor.

Writ issued 16th of August, 1855. Declaration in debt under 14 & 15 Vic. ch. 51, sec. 19.

Declaration states—that, after the passing of the above statute and the 16 Vic. ch. 45, to wit, on &c., and thence until suit, defendant was owner and holder of ten shares

subscribed by him in the stock of the Buffalo, Brantford and Goderich Railway Company mentioned in the last act; and that five pounds on each of the said shares was, and still is due by defendant to the said company (does not say for calls made). Then states, judgment recovered in the Queen's Bench by plaintiff 13th of July, 1855, against the said railroad company for £115 12s. 2d. in assumpsit. The issue of a *Fi. Fa.*, on the 13th of July to the sheriff of the County of Perth, against the goods of said company upon said judgment, returnable the first of Trinity Term next, endorsed for £76 11s. 3d., and delivered to said sheriff. That there were no goods in his county, wherefore he returned "no goods," on the 15th of August; whereby &c.; yet &c.

Pleas: First—Never indebted.

Second—Not a stockholder when action brought.

Third—No calls made by the company.

Fourth—Defendant released his shares to the company, who accepted the same before action brought.

Replication, to third plea—Alleges calls and concludes to the country.

To fourth plea—Denies the alleged release.

At the trial, before *McLean, J.*, it was admitted defendant became a stockholder of ten shares of five pounds each in the Brantford and Buffalo Railroad Company, created under 12 Vic. ch. 84, secs. 9, 18, in 1851, and 13 & 14 Vic. ch. 72. That on the 12th of July, 1855, plaintiff obtained judgment against the company—*i. e.*, the Buffalo, Brantford and Goderich Railway Company.

Venue does not appear.

On the 13th of July, 1855, *Fi. Fa.* issued to sheriff of the County of Perth under said judgment, endorsed as alleged, &c. Returned *nulla bona* on the 15th of August, 1855, the return day being the 27th of August, 1855.

Notice of call of ten per cent. 11th of October, 1851. On the 3rd of June, 1852, a notice calling for the balance due on the stock by monthly instalments on 10th of July, 10th of August, 10th of September, 10th of October, 10th of November, 10th of December, 1852.

At the trial it was objected:—No proof of publication of

calls in the county in which the company held their meetings; but the defect in proof on that head was supplied. Not proved that defendant was a stockholder when action brought. Also, that a return of *nulla bona* by sheriff of Perth insufficient—not the venue. That the writ was returned too soon, 27th of August being the return day. That defendant only liable to the *creditors*, and one only could not sue. No proof that defendant was a stockholder after the passing of the act of 1852.

These objections were overruled, and plaintiff obtained a verdict for £55 2s., including £8 2s. interest.

This is a Rule *Nisi* to set aside such verdict, as being contrary to law and evidence, and for misdirection.

Duggan, J. shewed cause, and referring to the statute 14 & 15 Vic. ch. 51, sec. 19, contended the *Fi. Fa.* was not required to follow the venue in the action, which it had not done. That plaintiff was not bound to wait till the return day. That its return was the act of the sheriff, not the plaintiff; and the act only says, "the action must not be brought until the writ is returned unsatisfied, wholly or in part."—The Buffalo, Brantford and Goderich Railway Company v. Parke, 12 U. C. Q. B. R, 607; 12 Vic. ch. 84.

Cameron, M. C., in reply, contended there was no evidence that defendant was a stockholder when the act passed extending the railroad, (13 & 14 Vic. ch. 72.) That all the creditors should join, and that the word *creditors* is not to be read *any creditor*.—Scott v. Berkeley, 5 R. W. Cases 51; C. P. 1847, S. C. 3 C. B. 92-5; Hitchins v. The Kilkenney Railroad Company, 10 C. B. 160; Marson v. Dudley, 16 Q. B. 344. Due diligence put in issue by plea.

MACAULAY, C. J., delivered the judgment of the court.

The acts to be noticed are, 12 Vic. ch. 84, 13 & 14 Vic. ch. 72, 14 & 15 Vic. ch. 121, 122; 16 Vic. ch. 190, (passed 14th June, 1853); see secs. 16, 17, 18, 16 Vic. ch. 45 (passed 10th of November, 1852), 14 & 15 Vic. ch. 51.

The Buffalo, Brantford and Goderich Railway Company was originally organized by the name of the Brantford and Buffalo Joint Stock Railroad Company, under the 12 Vic.

ch. 84, and afterwards confirmed by the 13 & 14 Vic. ch. 72, and exempted from the repeal of the last act by the 14 & 15 Vic. ch. 121, and finally changed to the name of the present company, by the 16 Vic. ch. 45, referring also to 14 & 15 Vic. ch. 122.

The mode of making and enforcing payment of calls was, until the last act, governed by the 12 Vic. ch. 84, secs. 9 and 18. But the 16 Vic. ch. 45, sec. 4, subjected it to the General Clauses Act, 14 & 15 Vic. ch. 51, including sec. 19.

As to the liability of stockholders the 16 Vic. ch. 45, sec. 2, enacted that nothing therein contained should be construed to make the said company a new company or a new corporation, so as to cause any action to cease, &c.: and, that every subscription to the stock of the said company, by its present name, should be to all intents and purposes as binding, valid, and effectual, and should vest in and impose upon the subscriber the same rights and liabilities as if made after the passing of that act, and to the stock of the said company by name thereby assigned to it. The 14 & 15 Vic. ch. 51, sec. 19, passed 30th of August, 1851, enacted that each shareholder should be individually liable to the *creditors* of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up; "but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders."

By sec. 16, number 10, the directors may from time to time make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall deem necessary; provided that thirty days' notice, at the least, be given of each call, and that no call exceeds the prescribed amount to be determined therefor in the special act, nor made at a less interval than two months from the previous call, or a greater amount to be called in in any one year than the prescribed amount therefor in the special act; and every shareholder

shall be liable to pay the amount of the call so made in respect of the shares held by him to the persons, and at the times and places, from time to time appointed by the company or the directors.

No. 12. The amount of which calls may be recovered by suit.

No. 13. Stating briefly the facts therein mentioned.

No. 24. Notices of calls to be published in the *Canada Gazette*, which shall be conclusive evidence of the sufficiency of such notices.

The special acts no otherwise determine the amount of calls than by 12 Vic. ch. 84, sec. 9, which enacted that any company incorporated under it might sue for, and recover from any stockholder the amount of any call or calls, &c., which he might neglect to pay after public notice thereof in any newspaper published in the district, &c.; and section 18, which authorised the directors to call in and demand from the stockholders, &c., all such sum or sums of money by them subscribed, at such times, and in such payments or instalments as the directors should deem proper, &c. See 30, as to requisite proof. The 16 Vic. ch. 190 has no clause relating to this company. See sections 16, 17, 18.

There appears therefore no limitation as to the amount of calls, but the General Clauses Act, sec. 16, No. 10, prohibits calls being made at less intervals than two months from the previous call.—The *Buffalo, Brantford and Goderich Railway Company v. Parke* (12 U. C. Q. B. R. 607), was cited to shew that the calls proved on the trial of this cause had not the necessary interval between them. 12 Vic. ch. 10, sec. 5, No. 11, the word "month" shall mean a calendar month.—1 E. & B. P. 16; *Nelson Road Company v. Bates* (4 U. C. C. P. R., 507), *Nelson Road Company v. Bates* (12 U. C. Q. B. R. 586).

If the case turned upon the third plea, denying the making of calls, the case cited from the U. C. Q. B. R. determines that the interval of two months did not intervene between the calls—that is, treating the monthly instalments as separate calls. It is by no means clear, however, that such instalments are separate calls. The call was for the balance due

on the stock, payable by instalments, and the whole time had elapsed long before this action was brought. See cases cited in *Nelson Road Company v. Bates* (4 U. C. C. P. R. 507).

If defendant is otherwise liable in this action, I do not see that the making of calls by the directors is a condition precedent to the plaintiff's right to recover; were it so, a creditor's remedy might be indefinitely deferred by the directors refraining from making calls; and the act is very general in its terms, and uses no restrictive language referring to calls. I am disposed, therefore, to consider the third issue immaterial. The second and fourth issues seem to have been properly found for the plaintiff, and the case turns upon the first. The plea of never indebted imposed upon the plaintiff the burthen of proving every material allegation in the declaration.

The defendant having become a stockholder under the former acts and the original name of the company, continued such after the name was altered, and the operations of the company extended, and the proof seems sufficient to establish every averment in the abstract.

The only objection that seems to have weight is to the sufficiency of the proof of the allegation of an execution against the company having been returned unsatisfied. Its issue and return *nulla bona* are averred—the latter under a *videlicet*; so that the objection may not arise on the declaration unless upon special demurrer, the day of the return alleged being before the return day. Had the plaintiff proved its return in fact, after the return day, it would have been sufficient; but the proof was of a return (as alleged) before the return day, and it is objected that such return was premature.

The declaration must be taken to allege the return of an execution against the company unsatisfied; and, I think, it forms properly a matter for the jury, whether a return in form was such a return as the statute requires—namely, a return unsatisfied, not *pro forma*, but after due diligence to realize the amount out of the effects of the company. The cases, *Cross et al. v. Law, Public Officer* (6 M. & W. 217, 223), *Eardley v. Law* (12 A. & E. 803), *Clowes v. Brettell* (10 M. & W. 506), *Field v. McKechnie* (4 C. B. 705; S. C. 5

D. & L. 172), *Dodgson v. Scott* (2 Ex. R. 457), bear analogy on this point.

It has not been contended that the proper course is by *Sci. Fa.* and not by action—*Ransford v. Bosanquet*, in error (2 Q. B. 972-7), *Cross et al. v. Law*, Public Officer (6 M. & W. 217), *Foster on Sci. Fa.* 90, 91, 123, and Sequel 133, 4; *Harvey v. Scott* (11 Q. B. 92)—See Imperial statute 8 Vic. ch. 16, sec. 36; 15 Ju. 336, 10 C. B. 160.

On the whole I think it incumbent upon the plaintiff to shew an execution against the company returned unsatisfied, and that such execution issued in a *bona fide* effort to obtain satisfaction, and that it was not in his power by reasonable exertion and efforts to have issued an available execution for that purpose. The execution must appear to have been returned unsatisfied, because no effects could be found available to the plaintiff under it. It bears analogy to the 4 Geo. III. ch. 1, requiring a return of *nulla bona* to warrant a *Fi. Fa.* against lands—3 O. S. 92.

The proceedings and evidence do not shew where the venue is laid in the action against the company; but the evidence does shew that no execution could have been made available against the company. I think the remedy is given by action, and that a single creditor may pursue it. The defendant did not rebut the presumption of his continuing to be a stockholder: the balance remained unpaid, and plaintiff seems entitled to recover.

Rule discharged.

MILLER V. ANDERSON ET AL.

Trespass quare clausum fregit—Assault and battery.

By indenture of bargain and sale one Jacob Miller conveyed to plaintiff the south-east quarter of lot No. 18 in the 8th concession of Markham, reserving the privilege of a road two rods wide through to the south-west quarter of the same lot, which he afterwards conveyed with the right of way reserved. In an action of trespass *quare clausum fregit* against the owner of the south-west quarter and his workmen for breaking and entering plaintiff's close, which was a lane nearly two rods wide leading from defendants' lot through plaintiffs's premises—*Held*, that defendant might justify under a grant of right of way; and that the lane upon which the trespasses were said to have been committed having existed, of nearly the same width as that described in the grant, for a long time, that the reasonable construction was that the grant of the right of way was meant to apply to that lane as the way granted.

Writ 6th of August, 1855: Declaration, 4th of September, 1855.

Trespass *quare clausum fregit*, for that—to wit, on the 28th of July, 1885, and divers other days, &c.—defendants broke and entered the plaintiff's close, being the south-east fifty acres of lot No. 18, 8th concession of Markham; bounded on the west by lands of Peter Anderson, on the north by lands of David Anderson, on the east by an allowance for road, and on the south by lot No. 17 in said concession, and broke gates and gate-posts, and dug holes, &c. Second count—*De bonis asportatis*, gates, &c., gate-posts. Third count—Assault and battery.

Pleas—First: Not guilty to the whole.

Second: Not plaintiff's close; omitting cutting gates and posts.

Third, by Peter and William Anderson to first and second counts: That for twenty years next before suit the occupiers of the west half of the rear half of lot No. 18, 8th concession Markham, adjoining said close in which, &c., had used and enjoyed, &c., as of right and without interruption, a way—to wit, three rods wide—for selves and servants to go, pass and re-pass, on foot and with horses, carts, &c., from said close into, through, over and along the close in which, &c., and from thence into a highway, backwards and forwards, &c., at all times, &c.; and as to the west half of the rear half of lot No. 18, Peter Anderson occupied it, and having occasion to use said way did at the time when, &c., with his servants, horses, carriages, &c., pass and re-pass along said way; and because the gate and gate-posts in said first and second counts mentioned were wrongfully in and across said way, obstructing the same, said Peter, at the times when, &c., and said William as his servant, dug up, pulled down and a little damaged and spoiled the same, &c., and took the same to a small and convenient distance, and there left them for plaintiff, doing no unnecessary damage; which are the same trespasses, &c.—Verification.

Fourth plea to first and second counts by said Peter and William Anderson: Peter Anderson was seized in fee of the west half of rear half of lot No. 18, 8th concession Markham; and that long before and from the 1st of October, 1850, one Jacob Miller, then owning both the closes of plaintiff and de-

fendant Peter Anderson in fee, by deed from said Miller to William Anderson, William Anderson became owner in fee of said west half of rear half of lot No. 18, 8th concession, now of said Peter Anderson, &c., said Miller granted to said William Anderson, his heirs and assigns, the privilege of a road two rods wide through the east fifty acres of said lot No. 18, which said fifty acres are the close of plaintiff, in which, &c., and so justify by grant, &c.

Fifth plea by Peter and William Anderson: That Jacob Miller was seised of both closes, and conveyed the close of defendant Peter Anderson to William Anderson, who conveyed to said Peter Anderson, and that afterwards Jacob Miller conveyed to plaintiff the close in which, &c.: that William Anderson while seised had a way of necessity over plaintiff's close, and so Peter Anderson, after becoming seised of the estate of Peter Anderson, and because, &c.

Sixth plea by William Anderson to third count: *Son assault demesne*.

Replication to first and second pleas. Similiter.

To third plea: Denial of twenty years' use of right of way, &c., and excess; more force and violence than necessary for abating and removing the said supposed stoppages and obstructions and opening the said supposed way, &c.; committed the said several trespasses in first and second counts mentioned, which are other and different trespasses than those attempted to be justified.

To fourth plea: Denial of grant and excess.

To fifth plea: Denial of way of necessity, and excess.

To sixth plea: *De injuriâ*.

Rejoinder: Not guilty to the new assignment, and issues on the whole.

It appeared in evidence that:—

First. By indenture of bargain and sale, dated the 21st of October, 1840, Jacob Miller, by the words grant, bargain and sell, &c., conveyed to William Anderson the west half of the rear half of lot No. 18, 8th concession Markham, specially described, together with the privilege of a road two rods wide through the east fifty acres of the said lot No. 18 as aforesaid, *habendum* in fee, in the usual terms of a printed deed; registered the 13th of June, 1855.

Second. By indenture of bargain and sale, dated the 28th of February, 1852, Jacob Miller conveyed to Elijah Miller the east part or quarter of lot No. 18, 8th concession Markham, containing fifty acres more or less, not otherwise described, but reserving the privilege of a road two rods wide through the said east fifty acres of the said lot No. 18 to the adjacent fifty acres of the same lot No. 18 aforesaid, unto William Anderson, senior, his heirs and assigns; together with &c., in the usual form of printed deeds, *habendum* in fee: registered the 8th of October, 1855.

Third. By indenture of bargain and sale, dated the 17th of June, 1852, William Anderson and wife conveyed to Peter Anderson the west half of the rear half of lot No. 18, 8th concession Markham, fifty acres more or less, specially described, together with the privilege of a road two rods wide through the east fifty acres of the said lot No. 18 as aforesaid; together with, &c.; *habendum* in fee: registered the 13th of June, 1855. Each of the foregoing deeds contains the word "grant."

Plaintiff gave evidence of a lane, not quite two rods wide and one hundred rods long, leading from the south-west quarter of the lot through the south-east half of it, to a highway, at the end of which where it joins the highway there had always been a gate or fence or bars for more than twenty years before the time when, &c. A gate that had been there was removed by some one, and the plaintiff was about restoring it. One or two gate-posts were set, and rails, from the posts to the side fence of the lane, one panel on each side; but the gate had not been put up.

The defendants, at the end of July or beginning of August, 1855, said they would throw the road open, and pulled down the rails, laying some in the lane and some in the highway; they also cut down the posts and threw them aside—all taking a part therein. This was the excess new-assigned.

The road had been used twenty-five years, though not so long fenced in as a lane. The gate-way was nine feet four inches wide. The defendants endeavored to shew that the gate-posts stood in the highway, and not upon the plaintiff's close, and that there had been a gate only at times, not con-

stantly; it was off and on. Plaintiff endeavored to establish an assault arising out of plaintiff's carrying away an axe of some of the defendants, and William Anderson following him with a rail, to make him drop it; in the course of which they threatened each other, one with the rail the other with the axe. The lane was said to be generally open in winter and shut in summer. Gate-posts were put up about twelve years ago, but there had been no gate for two or three years past, and it stood open that time.

The Chief Justice was of opinion, that on the plea of not guilty the verdict should be for the plaintiff against all who were there and took a part, unless the jury was satisfied that the fence removed was not on lot No. 18, but on the concession line. If on lot No. 18 then for plaintiff as to all or any of them, according to the evidence, on which he remarked—

Second. For plaintiff on the second plea, as the close in which, &c., did belong to him.

Third. That the alleged prescriptive right should be found for plaintiff, there being no prescriptive right to have the whole front of the lane open, but only a passage through the bars or gate.

Fourth. That the way by grant should be found for defendants, being a way two rods wide and covering the whole width all through to the road. But as to the excess newly-assigned, he thought the right of way would not give a right to cut down the posts, only to remove them, doing as little damage as might be.

Fifth. That a right of way of necessity should be found for plaintiff, for there would be no right of necessity for more than horses, carts, &c., to pass.

Sixth. As to the assault, it was left to the jury, though he could not say any was proved; and no evidence against any but Peter Anderson, and as to him no proof of striking with the rail, within striking distance. He thought the plaintiff entitled to a verdict on the first, second, third and fifth issues, and the defendants on the fourth: the sixth left openly to the jury. If any, who assaulted first? As to the excess, the plaintiff's counsel objected that the grant of way was not legal.

The jury found, as the verdict is entered, for all the de-

fendants as to the issues under the third count; for the plaintiff against Peter and William Anderson on the issues to the first and second counts; with £5 damages for the excess on the fourth issue; and for defendant Osborne, David Anderson and Trueman.

The Chief Justice's note is, Verdict for plaintiff on the first and second issues and £5 damages, but only against Peter and William; for the other defendants, on the first issue on the third and fifth issues, for the plaintiff; on the fourth, for plaintiff as to the excess; on sixth, for defendants.

Plaintiff's counsel obtained a rule *Nisi* to set aside the verdict for plaintiff, and for defendants on the issues found for them; the verdict for defendants being contrary to law and evidence, and for misdirection.

M. Vankoughnet shewed cause, and referred to Ba. Ab. Grant H. 3; Sheppard's Touchstone 78; Com. Dig. Grant E. 5.

M. C. Cameron supported the rule, and relied upon the want of proof of an existing road, and of uncertainty in the road mentioned in the deeds, and referred to Preston on Conveyancing, 394.

MACAULAY, C. J., delivered the judgment of the court.

The verdict is not entered in accordance with the Chief Justice's note, and if amended it should be—

Not guilty—First. For plaintiff against Peter and William Anderson; and for the other defendants, to first and second counts; and for all to third count.

Not possessed—Second. For plaintiff against all the defendants—applies only to first and second counts.

Prescription—Third. For plaintiff against Peter and William Anderson, who alone pleaded; and for the two defendants, as to excess.

Grant—Fourth. For defendants Peter and William Anderson, who alone pleaded against them; for excess, £5.

Necessity—Fifth. For plaintiff against Peter and William Anderson, who alone pleaded; and for them as to excess.

Assault—Sixth. For all the defendants.

So plaintiff has a verdict against Peter and William

Anderson on the first issue, and the new assignment of excess to fourth plea, £5 damages, and against all on the second issue; also against Peter and William on the third and fifth issues; the residue for defendants. As to the first issue, it was for the jury; so the last—*Cowling v. Higginson* (4 M. & W. 245), *Osborn v. Wise* (7 C. & P. 761), *Webber v. Sparkes* (10 M. & W. 485-6), *Dand v. Kingscote* (6 M. & W. 173), *Ellison v. Poles* (11 A. & E. 665).

Plaintiff has a verdict against all on the second issue, and against those two who pleaded the third and fifth pleas. All turns then on the fourth issue, for he has a verdict as to excess, £5 damages. Then, as to the fourth plea, I think it quite clear that the two defendants have established a right of way by grant; the effect of which, with the rest of the verdict, is to bar the plaintiff so far as to limit his recovery to £5 on the issue of excess to the fourth plea, and costs of the other issues found for him, against which defendants' costs of issues found for them may be placed.

I see no sufficient ground for setting aside the verdict. The main question was, whether the two defendants could justify under a right of way by grant, prescription or of necessity. I think a right of way two rods wide was granted; and that a lane having long existed of nearly that width leading from the highway through plaintiff's close to defendants', the reasonable intendment is that the grant was meant to apply to that lane as the way granted.

My doubt is, whether the fourth plea shews an obstruction impeding the actual use of the right of way at the time when &c., to justify abating the alleged nuisance on the one hand; and if the plea be sufficient, then whether cutting down the posts, &c., is not justified on the other. But the defendants acquiesce in the verdict, and have not moved against the finding of the jury as to the excess. There being a grant of way, and a wrong in fact existing at the time, would indicate what the grant meant.

Per Cur.—Judgment accordingly.

SHIPMAN V. GRAYDON.

Landlord and tenant.

In an action for distraining goods where no rent was due, and the case was left to the jury as an ordinary case, without being expressly left to them to find double damages, and without their being apprised of the provisions of the statute, the court refused to increase a verdict to double the value of the goods distrained.

CASE for distraining plaintiff's goods, a sleigh, &c., when no rent was due. Second. For excessive distress, and selling at under value. Third. Trover.

Pleas—Not guilty, by statute: a general verdict for plaintiff, and £8 15s. damages on all three counts.

Plaintiff's counsel, *Cameron, H.*, now applies to the court to order judgment for double the amount of the verdict or value of the goods.

Defendant's counsel, *Vankoughnet, M.*, shewed cause.

It appeared by the Chief Justice's notes that plaintiff was a tenant of Graydon, under a verbal demise, commencing in August, 1853, at £12 10s. a year, rent to be paid yearly, quarterly, monthly or weekly, but no definite time fixed; and there was no evidence of payment, except that defendant's son said he had often demanded weekly rent at his father's request. A notice to quit on the 9th of August, 1855, was served on plaintiff 22nd January, 1855; and Armstrong distrained for 9s. 7d. rent in arrear, under a warrant of Graydon, dated 22nd or 24th January, 1855. He seized and sold a cutter worth about £8 15s.

There was evidence that Graydon admitted the plaintiff owed him only a small sum, which plaintiff paid, and some small balance over, which he said Graydon could pay him at any time,—when not clearly appearing; but last winter, before the distress, at a time when plaintiff was about leaving the premises to go to Port Perry.

The jury found for plaintiff £8 15s., and no rent due.

Vankoughnet contended that the application was too late, and that the additional value should have been assessed by the jury at the trial, which he failed to desire.

Cameron contended he had adopted the correct course in the application—referring to *Hilton v. Fowler*, 5 Dow. P. C. 812;

Masters v. Farres, 1 C. B. 715; Statute 2 W. & M. ch. 5, sec. 4; *Woodgate v. Knatchbull*, 2 T. R. 148; *Buckle v. Bewes*, 4 B. & C. 154; *Cann v. Facey*, 5 N. & M. 405; *Baker v. Brown*, 2 M. & W. 199.

The case of *Baldwyn v. Girries*, reported in *Godb.* 245 and *Moo.* 873, pl. 1217, is not quite like the present—S. C. 18 Vin. Ab. "Prohibition" F. No. 4.

The case of *Masters v. Farres* (1 C. B. 715) is more like it. There was in that case a count for trover in addition to the count for distraining when no rent was due. Here there are three counts, and a general verdict on all; and we are asked to double the damages, the effect of which would be to double them on all the three counts. In that case *Maule, J.*, said the jury ought to have been directed, if they found for the plaintiff, to give damages to the amount of double the value of the goods, but that he did not remember having so directed them, or that he was asked to do so. *Tindal, C. J.*, said the mistake should have been set right at the time, and that it was then too late to apply to the court, being after the expiration of the four days for moving. *Maule, J.*, said the complaint in substance was, that the jury had given an insufficient amount of damages.

Cases where treble or double damages are to be recovered do not present the same difficulty, because the court has in the verdict the amount of single damages, if it appears or is presumed that single damages only were given.—*Deacon v. Morris* (1 Chitty's Repts. 141), *Buckle v. Bewes* (4 B. & C. 154, 1 Lord Ray. 342), *Barnard v. Moss* (1 H. B. 107), *Attorney General v. Hatton* (13 Price 476–7, S. C. 1 McCl. 214). It was held that the verdict must be taken to be for single value when nothing is said about it at the time, and the course was for the officer to double the amount. But there the jury were aware of the usage, and knowing their verdict would be double, did not allow the full value (of duties abstracted in that case), but half the amount. So the language of *Garrow, B.*, who tried the case, as reported in 1 McCl.

Now in the present case it does not appear that the jury were aware of the course now urged upon the court, or that

the court at Nisi Prius was requested to direct them to find double the value of the chattel distrained, or to ask them whether what they did find was its value simply.

Their verdict covering the other counts may in fact have been for more than the simple value of the sleigh in their opinion. The amount is the original price, according to the evidence: and I think not only should the verdict have been restrained to the first count with a view to double damages, but that it should have been left to the jury to assess them or to declare expressly whether the amount they found was single value only. It is not like doubling or trebling the damages found. We are asked to assume that single value only was found, and nothing more, and then to double it, on the first count.

When stringent laws of this kind are to be applied, we should see our way very clearly that it is incumbent on us. In this case I do not see my way so clearly, for I think it should either have been left to the jury expressly, or that they should have been apprized of the provisions of the statute, and been asked whether they found double or single value only. That was not clear, but it seems to have gone to the jury as an ordinary case in which the plaintiff sought redress by single damages only; and I do not think that after having so submitted the case to the jury, with a view to full redress in their verdict, and which they supposed to be its effect, the plaintiff can now call upon the court to double them as of course, without knowing how far the jury might have modified their verdict, had they been aware that the consequence contended for was to follow.

Rule discharged.

ELISHA LANE, ROMEO HANSEN STEPHENS AND GEORGE
WASHINGTON STEPHENS V. ALPHEUS JONES.

Customs—Duties.

High-wines imported into this province are liable to a duty on each gallon, according to the strength of proof by Sykes' hydrometer, and not according to the gallon by measurement.

Writ issued 7th August, 1855: Declaration 6th September, 1855. Assumpsit for money had and received.

Pleas—To all but £3 5s., non-assumpsit per statute; and as to £3 5s., payment into court.

The plaintiffs claimed £89 11s. 8d. as having been over-charged and paid to defendant as collector of customs at Prescott on 4500 gallons of whiskey, at five pence per gallon, on the 12th of May, 1855.

The plaintiffs entered 250 casks of high wines, containing 7815 gallons and 1959 gallons, equalling 9,774

Charged 11253 gallons and 2821 gallons 14,074

Difference..... 4,300

Also £3 2s. 6d. over-paid on the casks.

The case was tried before Macaulay, C. J., at the last assizes at Brockville, when notice of action was admitted. Plaintiffs proved the entry of the high wines on the 12th of May, 1855, and payment of duties on the number of gallons above stated, the high wines being called forty-four per cent. over proof, and the duty of five pence per gallon charged upon the quantity thus increased and paid under protest: that the liquor was forty-four per cent. above whiskey proof by Sykes' hydrometer, and reduced accordingly for duty. The duties had been paid over to the Receiver-General in June.

It was then given in evidence that high wines are entered under the head of whiskey; and the question is, whether the duties are to be paid upon such high wines as so much whiskey, or whether the liquor is to be first reduced to the lower proof.

Witnesses were examined as to the practice, and it appeared that high wines were entered as whiskey over-proof, but reduced for duty to whiskey-proof by Sykes' hydrometer.

For the defendant it was contended—First. That he was not liable, having paid the monies over to government before suit: to which the plaintiffs' counsel answered that it was paid under protest, and should have been retained or paid with reservation. Second. That the duty charged was legally collectable; and on reference to the provincial statute 12 Vic. ch. 1, schedule A., and the 18 Vic. chs. 5 & 81, sec. 2, the learned Chief Justice ruled that the last act was declaratory

or retrospective, and put an end to the question; and by his direction the jury found for defendant.

In the ensuing term (Michaelmas Term, 19 Vic.) *Sherwood*, *G.*, for plaintiff, obtained a rule on the defendant to shew cause why the verdict should not be set aside for misdirection, &c.

Richards shewed cause during the same term, and contended that the word "gallon" meant the gallon-proof by Sykes' hydrometer: that by the statute 18 Vic. ch. 5 the gallon-proof by Sykes' hydrometer should, in lieu of the duty to be paid under former statutes, be liable to the duty imposed by that statute: that the intention of the legislature was to impose the rate of duty upon the gallon by strength, and not by measurement, substituting the duties declared in the statute 18 Vic. ch. 5 instead of the duties declared by the statute 12 Vic. ch. 1, sch. A.: that the 18 Vic. ch. 5 explains the 12 Vic. ch. 1, sch. A., and is to be considered as declaratory of the former act: that considering the liquor imported as high wines or whiskey, the duty was rightly charged: that the previous enactments should be read through this; that is, the 18 Vic. ch. 5.

Sherwood, in reply—That whiskey may be of any strength: that the evidence shewed that high-wines was considered by merchants as whiskey in a certain sense: that whiskey is of no particular strength: that the statute is not retrospective, and that the word "is" has reference only to the time of the passing the statute.

MACAULAY, C. J., delivered the judgment of the court.

Upon reference to the statutes 4 & 5 Vic. ch. 14; 8 Vic. ch. 3 and schedule; 10 & 11 Vic. ch. 31 and schedule; and the 12 Vic. ch. 1, schedule A., which has "spirits and strong waters of all sorts, for every gallon of any strength not exceeding the strength of proof by Sykes' hydrometer, and so in proportion for any greater strength than the strength of proof, and for any greater or less quantity than a gallon—namely, whiskey the gallon, three pence, and further for every £100 value £12 10s.; rum the gallon, one shilling and three pence; Geneva brandy, and other spirits or strong waters except rum and whiskey, the gallon, two shillings.

although the owners do undertake and are bound to carry them safely, so far as in their power, still serious accidents it is well known may happen from slight degrees of negligence.—*Christie v. Griggs*, 2 Camp. 81. Carriers of passengers are not insurers like common carriers of goods, and are only liable for negligence including of course, the consequences of the injurious act or tort which constitutes the negligence. Where negligence is established or admitted, the question of damages no doubt rests with the jury under the circumstances in evidence; still the cases on the subject seem to indicate that such damages require the exercise of a sound discretion with a view to afford pecuniary redress to the injured party for the damages he has sustained.—*Blake v. The Midland R. W. Co.* (16 Jur. 562); *Theobald v. The R. W. Co. Passenger Assurance Co.* (18 Jur. 583). It is difficult to say here that the jury have acted upon any wrong principle or been actuated by improper motives; still it does not appear to the court that they have exercised a sound and reasonable discretion. The grievous bodily injuries and suffering of the plaintiff may have influenced them in awarding so large a sum; no doubt they did, for there was little else laid before them on the subject. But, however attended with difficulty as a precedent for disturbing verdicts on grounds so peculiarly within the province of the jury, we have to consider that to confirm it might serve to form another, which might prove inconvenient and be in other points of view not reconcileable with the exercise of a sound judicial discretion.

We think, therefore, we ought to grant this rule upon terms, unless the parties can agree to reduce the verdict to a smaller sum. If not, we think that the rule should be made absolute; but only on these terms—viz., upon payment of costs and upon payment into court of the sum of £500, with leave to the plaintiff to accept it without prejudice to his claim for damages ultra at another trial. The defendants, if so advised, being at liberty to add a plea of such payment into court. The same and costs to be paid on or before the 1st of August next; in default of which the rule is to be discharged. We exact this condition not because we consider the sum mentioned to be sufficient in amount to cover the plaintiff's

damages, but because the plaintiff has manifestly sustained great damage and been put to much expense; and we do not feel that we can relieve the defendants from the present verdict without their indemnifying him in a sum sufficient to cover his expenses and to enable him to take the case down to another trial, which the defendants desire to have. Of course, if the whole sum was paid into court to abide the result, that would do; but the sum is so large that we do not propose to impose such a condition. On the terms mentioned, we think we ought to allow the case to go to another jury, but we do not feel justified in so doing on any other more favorable terms to the defendants.

Per Cur.—Rule accordingly.

PARNELL V. MARTIN.

Assumpsit—General issue, and set-off.

By agreement under seal, the plaintiff in this case agreed with the defendant to manage, cultivate and improve the defendant's farm for one year, and do whatever work defendant should require during that period, in consideration of the sum of £95, payable at the expiration of the said term—plaintiff to have the use of the house on said farm during the term, pasture for two cows, and half an acre of land for a garden. The plaintiff served the defendant until within three weeks of the end of the term—then left the farm at the defendant's request, and upon defendant's promise, if he would do so, to pay or settle with him. Defendant afterwards objected, and plaintiff sued in an action of *assumpsit* for work and labour generally. Defendant obtained a verdict.

Rule *Nisi* to set it aside and enter verdict of £35 for plaintiff, on leave reserved.

Held—That the plaintiff could not declare in *assumpsit* for work and labour generally, because the work was performed under a sealed contract.

ASSUMPSIT, among other things, for £35, work done and materials.

Pleas—General issue and set off.

By agreement under seal of plaintiff and defendant, dated 24th April, 1854, plaintiff agreed that he would, for one year from the 1st May, 1854, manage, cultivate and improve the defendant's farm therein mentioned, and do whatever work defendant should require during that period. In consideration of which said promise and agreement and other the premises aforesaid, defendant agreed to pay plaintiff the salary or sum of £95 at the expiration of the said term, &c.; plaintiff to have the use of the house on the said farm during

the term, pasture for two cows, and half an acre of land for a garden.

The plaintiff served defendant till within about three weeks of the end of the year; and then, in April, 1855, left the farm at the defendant's request, and upon his promise, if he would do so, to pay or settle with him.

He now objects assumpsit will not lie by reason of the sealed agreement.

Verdict for defendant.

Rule *Nisi* to set verdict aside, and enter it for plaintiff for £35, on leave reserved.

Another ground of action for the price of horses sold by plaintiff to defendant was met by proof of payment.

Crooks shewed cause.

Wilson, Q. C., in reply, cited *Armstrong v. Anderson et Cumming*, 4 U. C. R. Q. B., 113; *Turley v. Grafton Road Company*, 8 U. C. Q. B. R., 579; *Jones v. Nanney*, 1 M. & W., 333; 1 *Smith, L. C.*; *Fewings v. Tindal*, 5 D. & L., 196. For plaintiff, *Cort & Gee v. The Ambergate, Nottingham & Boston and Eastern Junction Railway Company*, 17 Q. B. 127; *Cro. Car.* 343; *Ashbrooke v. Snape*, *Cro. El.* 240; *Foster v. Allanson*, 2 T. R. 479.

MACAULAY, C. J., delivered the judgment of the court.

The plaintiff cannot declare in assumpsit for work and labour generally, because the work was performed under a sealed contract, excluding the implication of any promise in law arising out of the performance of his covenant, which affords a higher security or remedy. Then performance—viz., a year's services—being a condition precedent and the contract entire, no action would lie on the covenant without the averment of performance, which plaintiff could not establish. A verbal waiver could not be pleaded in excuse of the time omitted, and so plaintiff without remedy on the special agreement.

I see no remedy at law, unless it be competent to the plaintiff to declare as upon a new special agreement by parol—namely, that in consideration that he at the defendant's request would refrain from completing the residue of the

year's service, (whereby he would have been entitled under the covenant,) defendant promised to pay him for the services he had rendered under it, admitting that plaintiff did so agree to refrain, and had refrained. This would be according to the facts, and apparently founded on mutuality of consideration:—the one refraining from services he was entitled to continue, and the other, in consideration thereof, promising to pay for what had been done.

In *Goss v. Lord Nugent* 5 B. & Ad. 58), Lord Denman said, "After the agreement is reduced to writing, it is competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from, or vary or qualify the terms of it, and thus to make a new contract. But that was a parol, not a sealed agreement.

Rule discharged.

CARTER V. HIBBLETHWAITE.

Lease—Verbal assent to sublet—Ejectment.

In an action of ejectment for breach of covenant not to assign without license, &c., against the assignee of the lessee, the plaintiff's verbal assent to the assignment, before defendant enters into possession, is no defence to the action.

Writ, 25th June, 1855. Ejectment for the east half of south half of Lot No. 11, 5th concession, township of London.

Lease—Indenture made 1st May, 1851, in pursuance of an act to facilitate the leasing of lands and tenements, between plaintiff and William Taylor—witnessed that plaintiff, in consideration of the rent thereafter reserved, and of the covenants thereafter contained on the part of the said William Taylor to be paid and performed, did lease, and to farm let unto the said William Taylor, all that farm known as the east half of the south half of Lot No. 11, in the fifth concession township of London, containing forty-three acres, more or less; to have and to hold to said William Taylor from the 1st May present until the full end and term of five years from thence next ensuing and fully to be complete and ended, —yielding and paying therefor the clear yearly rent of £13 15s. of lawful money of Canada, half-yearly in advance; the

first payment of £6 17s. 6d. to be made at the time of the execution thereof. And the said lessee covenanted with the said lessor to pay rent, and to pay half the taxes and all the statute labour; and the said lessee hath power to cut down and use only twelve acres of wood, which wood is to be cut on the east side of the lot; and the said lessee doth covenant to clear up and fence in a lawful manner all the land from off which he cuts wood on the said twelve acres, against the expiration of the said lease; and the said lessor hath power to enter and view state of lands and buildings; and the said lessee will keep the fences in good order, and also the buildings, and will not assign or sublet without leave; and the foregoing is subject to a proviso for re-entry by the lessor, on non-payment of rent or non-performance of covenants; and the said lessor covenants with the said lessee for quiet enjoyment. In witness whereof, &c. Signed and sealed by both.

The lessee said he assigned the lease to defendant, who entered and cropped it. There was evidence, and the jury found, that the plaintiff verbally assented to the assignment, after the assignment, but before defendant entered into possession. Rent offered but refused; defendant possessed and improved. The assignment was destroyed after plaintiff dissented. The assignment was a year and more after the lease.

Wilson, for plaintiff, contended—The lease had been assigned without leave in writing, and a subsequent verbal assent will not operate as a sanction or waiver binding on the plaintiff. That it is a statute lease, and within the provisions of the 14 & 15 Vic. c. 8; *Cro. Ja.* 398; *Smith v. Arnold*, 3 Sal. 3.; *Platt on Leases*, 467; *Doe dem. Nash v. Birch*, 1 M. & W. 402; *Doe dem. Gregson, widow, v. Harrison*, 2 T. R. 425; *Littler et al. v. Holland*, 3 T. R. 590. Acceptance of rent might be a waiver, because it would be an act recognizing the tenancy as continuing. A mere *ex post facto* assent is *nudum pactum*.

M. C. Cameron, for defendant, contended,—That it was not a lease within the statute, not conforming to its terms as it should do strictly—pointing out wherein it varies, or

omits a due observance,—2 Platt on Leases. That payment of rent should be presumed in May; and if so, it cured the forfeiture: so plaintiff acquiesced in the assignee entering and possessing, and that had a like effect.—See Doe dem. Sore v. Eykins, 1 C. & P. 154; and the statute 14 & 15 Vic. ch. 8 sec. 4 No. 7. “And also, that the lessee shall not nor will, during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred, set over, or sublet unto any person or persons whomsoever, without the consent in writing of the lessor, his heirs or assigns, first had and obtained.”—*Ib.* c. 7 s. 4. A lease required by law to be in writing of any tenements and hereditaments, and an assignment of a chattel interest in any tenements or hereditaments, &c., not being an interest which might by law have been created without writing, shall be void at law, unless made by deed.

MACAULAY, C. J., delivered the judgment of the court.

We think the lease is within the statute, so as to entitle the plaintiff to the proviso, against assigning without license in writing; and that the lessee having assigned without any license, the subsequent oral acquiescing is not sufficient to bind the lessor as having waived the forfeiture, especially as any such assent seems to have been recalled before the defendant entered, and as the defendant seems to have destroyed the assignment in consequence of the plaintiff's dissent, so that it cannot now be produced, that its contents, date, &c., may be seen, and that it may appear whether it was executed under seal or not—14 & 15 Vic. c. 7 s. 4. Rent, though afterwards offered by the defendant, has been refused by the plaintiff, wherefore no act done, apart from verbal assent before entry, is proved in confirmation of the assent, and that was *nudum pactum*, and cannot estop the plaintiff.—Doe dem. Weatherhead v. Curwood (1 H. & W. 140), Doe dem. Sore v. Eykins (1 C. & P. 154), Doe Shepard v. Allen (3 Taunt. 78), 2 Platt on Leases, 277, 467; 14 & 15 Vic. ch. 7 sec. 4. That a surrender in writing, if not by deed, is void.—Doe ex dem. Davenish v. Moffatt (15 Q. B. 261.)

Judgment for plaintiff.

GLOVER v. WALKER ET AL.

Crown lands—Receipt of.

A purchaser from a crown land agent, who holds a receipt for an instalment of the purchase money but who has not obtained a patent, may maintain trespass *qu. cl. fr.* against all strangers, though not against the Crown.

TRESPASS, *quare clausum fregit*. Pleas, General issue—Not possessed, and *liberum tenementum*.

It proved to be a government lot, sold 5th of January 1855, to plaintiff, who produced a receipt from the crown land agent, Jackson, of that date, for £3 15s. as a deposit on account of lots numbers 83 and 84, 3rd concession Glenelg, first instalment. Plaintiff entered upon the land and commenced erecting a log-house, &c., but had received no license of occupation, and the sale was not confirmed.

It appeared the lots 83 and 84, with other crown lands, were offered for sale on the 4th of January, 1855, previous to which the defendants had done some underbrushing upon lot number 84, as squatters or trespassers. That on the 5th of January the plaintiff purchased the lots, and in two or three days afterwards the defendants, or some of them, applied to the crown land agent to purchase, and claimed a prescriptive right in consequence of their alleged improvements; owing to which the matter was referred to the Executive Government and remains still undecided. That the crown land agent considered such receipt as he gave the plaintiff authorized the purchaser in ordinary cases to take possession. That in the spring the plaintiff or his servants entered upon lot number 84 and chopped two acres or so. They also erected the walls of a log shanty or dwelling-house, but before it was roofed in the defendants came (in June 1855) and felled two trees across it, which injured it so much that it took three men nearly one day to repair the damage. This was the trespass complained of. The defendants were all there, and some had guns.

It was contended the plaintiff did not shew a possession sufficient to maintain trespass, being a mere intruder upon crown lands. The objection was overruled, and the jury found a verdict for defendants on all the issues to the second count, and for plaintiff on first count, and 20s. damages.

Rule Nisi to enter a non-suit on leave reserved.

Cosens shewed cause.

McPherson supported the rule, referring to 15 Vic. ch. 159; Co. Lit. 15; *Harper v. Charlesworth*, 4 B. & C. 583; and contended plaintiff was not an intruder upon the Crown, but like a tenant at suffrage, or in possession with assent of the Crown, sufficient to support trespass against a wrongdoer at common law.—*Doe dem. Watt v. Morris*, 2 B. N. S. 189; *Monahan v. Foley et al.*, 4 U. C. Q. B. R. 129; *McLaren v. Rice*, 5 U. C. Q. B. R. 151; *Perry v. Buck*, 12 U. C. Q. B. R. 451.

MACAULAY, C. J., delivered the judgment of the court.

Until the recent statute 16 Vic. ch. 159, a receipt such as the plaintiff produced and relied on entitled the vendee of the Crown, to enter, and not only to maintain trespass against tort feazer after having entered, but to bring ejectment against any one wrongfully in possession; and though the nature of the authority so to enter, or to bring ejectment has been altered by the late act, and although the receipt expresses no authority to enter, still I think that when a purchaser has entered under a contract for the purchase, though he could not hold against the Crown, he may be regarded as so far possessed as to be able to maintain trespass against a stranger, wrongfully, and with force and arms, assailing such his possession. The Queen might probably elect to treat him as a mere intruder, if he entered without the sanction of a license of occupation. So a license of occupation when afterwards issued would confirm a possession previously taken. Wherefore, although the mere receipt contains no such license, yet looking at the spirit of the statutes and the former provisions on this head, the portion of the interest acquired by the purchaser paying one or more of a series of instalments to become due at yearly or long intervals, and the prevailing practice, I think we are justly entitled to regard a vendee of the Crown, who has paid one or more instalments, and has entered into peaceable occupation of the land purchased, entitled to support an action of trespass in defence of such possession against wrongdoers, so long as the Crown does not dissent to such occupation. The crown land agent said purchasers were all considered entitled to enter on

obtaining a receipt; and it is evident it could not be regarded, or contemplated that the land was to lie waste or in its natural state without improvement until the whole of the purchase money was paid, by instalments at yearly intervals. The plaintiff having entered in the assertion of a supposed right and made some improvement, and having partly erected a log house, he was in possession in point of fact of so much of the lot, and the trespass complained of was upon such actual possession. To hold that even a squatter's house, whether built or in course of building, might be destroyed by strangers wrongfully felling trees upon them, or by other acts of violence, on the technical ground that the possession remained in the Crown, notwithstanding the intrusion of the squatters, would, I think, be carrying the doctrine too far, or misapplying it to the wild lands of the crown in Upper Canada in a contract between a peaceable occupant and a wrongdoer, and be inconsistent with the legislative provision that has existed in favor of unauthorized occupants—4 & 5 Vic. ch. 100, sec. 25; 7 Vic. ch. 11, sec. 7; and the regulations of the Executive Government in that behalf, under 16 Vic. ch. 159, sec. 25.

Whatever arguments or rules apply to the case of squatters must operate *a fortiori* in favor of vendees of the Crown, who may have entered after obtaining receipts for one or more instalments, but before receiving formal licenses of occupation.

Rule discharged.

JAMES DOWLING, ELLEN DOWLING HIS WIFE, AND MARY MOORE, v. JAMES POWER.

Devise—Executors—Sale by.

A. by will devised as follows: "I give and bequeath to my wife, after my decease, the *proceeds* of one half of all my lands, cattle and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle and effects of every kind whatsoever I leave in the hands of my executrix and executors, to pay all my just debts, &c.;" and appointed his wife executrix, and two other persons executors. *Held*, that by such devise the estate passed to the executors to sell, &c., and did not confer only a mere power to sell.

EJECTMENT for part of lot No. 26, North Shore, Prince Edward's Bay, Marysburg, in possession of James Moore at his death. Writ issued 3rd of September, 1855.

It was proved that James Moore had been ten years in possession, and died in January 1851 without issue, leaving the two female plaintiffs, daughters of his eldest brother William, surviving. Two other brothers left children, John and Edward.

Will 3rd January, 1852. "First. I give and bequeath to my well-beloved wife, Eleanor Moore, after my decease, the proceeds of one-half of all my lands and cattle and other effects of every kind whatsoever to me belonging at the time of my decease; and the other half of my said lands and cattle and effects of every kind whatsoever I leave in the hands of my executors and executrix to pay all my just debts, and to give my body a decent Christian burial; and should there remain any surplus, then it is my will and desire that such remainder shall be given to the Catholic Church, for the performing of masses for the benefit of my departed spirit."—Appoints his wife executrix and John McDonell and William Synet executors. Registered 30th of January, 1854.

March 4, 1854: Deed by executors and executrix to defendant in consideration of £350: registered 6th March, 1854. It recited the will, and the intention to sell for the purpose therein indicated, in pursuance of the powers thereby conferred, &c.

The learned judge (*Draper, C. J.*) ruled in favor of the plaintiffs. Rule *Nisi* to set aside the verdict as against law and evidence, for misdirection, and on affidavits objected to as filed too late. Personalty sold for £143 11s. 10d: half would be £71 15s. 11d.

The Solicitor-General shewed cause, and contended that plaintiff was entitled to an undivided one-eighth or two-sixteenth parts—*Doe Humberstone v. Thomas*, 3 O. S. 516.

He objected to the reception of the affidavits offered, as being sworn since the time for moving and not filed in time: that one of the deponents was examined at the trial, and another was present, yet not called. He also objected to the rule as being in the name of John instead of James Dowling. If affidavits received, still that it was necessary to defendant to have proved debts to warrant and support a sale; and that the affidavits are vague, and do not shew with tangible

certainly any debts that required the sale of the land. The want of personal assets not sufficiently shewn.

Wilson, Q. C., in reply, contended: First. That the reception of the affidavits rested with the court. Second. And they shew that debts were owing. Third. And if debts existed, the sale was valid in favor of the purchaser. Fourth. But that the will passed the estate to the executors, and proof of debts was not required. That the word "proceeds" implied a sale, and the intent was clear that all should be sold and the proceeds disposed of as directed; at all events the executors could sell half, the words, "I leave in the hands of my executors," being equivalent to a devise to them to sell. The widow is both devisee and executrix, and her undivided interest enabled the sale of the whole. The superstitious use is not material to the point—*Blatch v. Wilder*, 1 Atk. 420; *Doe dem. Jones v. Owens*, 1 B. & Ad. 318. A devise to executors to pay debts, though only a life or yearly interest, would support the deed so far—*Doe dem. Goldin v. Lakeman*, 2 B. & Ad. 42; 1 Ves. Sen. 42–171; 2 Preston on Estates, 75; 8 Vin. Ab. 236; 2 Vernon, 153; 1 Ch. Ca. 196.

MACAULAY, C. J., delivered the judgment of the court.

If it is incumbent upon the defendant to prove the existence of debts, for the satisfaction of which it became necessary to sell the lands of the deviser, I should be in favor of granting a new trial on payment of costs, to afford the defendant the opportunity of proving such debt or debts, although such proof was neglected or omitted at the last trial, and although the affidavits in support of this rule have been sworn and filed at too late a day. The defendant appears to be a *bond fide* purchaser for value under a will, the construction of which, in my opinion, is very doubtful; wherefore, before the defendant is dispossessed, I think we ought to afford him the benefit of another trial—although we do rather infringe upon the general rules of practice on the subject of new trials.

But as to the will itself, I am much inclined to think it devised the estate to the executors to sell, and did not confer upon them a mere power. It certainly did give the power to sell, or it did give a legal interest in the land by virtue of

which the executors could sell; and if any estate or interest is given, I do not see that it can be less than a fee.

What weighs with me are the considerations that on the whole will it is evident the testator did not intend to die intestate as to any part of his land. That he in the first place devised the proceeds of one-half of all his lands, cattle and other effects of every kind whatsoever to his wife, under which words I think she took an absolute interest in half of the land, as well as in a moiety of the cattle and other effects; and that the devise of the proceeds of the land, &c., was equivalent to a devise of the land itself (by analogy to cases in which a devise of the profits has been held to pass the estate), especially when taken in connection with the gift of half the personal effects which accompanies it. This construction is further supported by the devise of the other moiety, in which the word "proceeds" is not used; the words are, "and the other half of my said lands and cattle and effects of every kind whatsoever," as if one half had been already disposed of. This other half "I leave in the hands of my executors and executrix, to pay all my debts, &c., and should there remain any surplus, then," &c. Now this imports that there were debts to be paid, which debts might exhaust more than half the personal assets (the other half being specifically given as a legacy to the widow) and entitled to exoneration by the moiety of the lands; but should there remain any surplus it was to be given to the Catholic Church, for the performance of masses for the benefit of his departed spirit. This is said to be a superstitious use and void, and also void for uncertainty as to what church is meant; but it shews the intention of the testator not to die intestate, or to leave anything undisposed of; and, however invalid as to the object, it does not follow that the whole clause is void, as the case of *Cary v. Abbott* (7 Vezy. 495) shews.

There is no intention evinced that the land should not be sold to pay debts: it was apparently expected to be necessary; and if so, the devise in trust or power to sell, whichever it be, was not limited to that object, so that the residue could go over to residuary devisees or legatees; for the whole moiety of lands and personal effects is left in the hands of the executors

for the twofold purpose of paying debts, and should there remain any surplus, such remainder was to be given to the Catholic Church, &c.; shewing, I think, that the executors were to pay debts and give any surplus to such church. Being saleable for the satisfaction of debts, a trust or power over the whole follows, according to the cases of *Doe Tompkins v. Willan* (2 B. & A. 84), *Houston v. Hughes* (6 B. & C. 403-421).

Bayley, J., said, upon the question whether the trustees take the legal fee or not: "I think that, according to the case of *Doe Tompkins v. Willan*, where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will—*Doe Shelley v. Edlin* (4 A. & E. 582), *Doe Cadogan v. Ewart* (7 A. & E. 636), *Doe Davies v. Davies* (1 Q. B. 430), *Watson v. Pearson* (2 Ex. R. 581-593, and *American Notes* at the end), *Adams v. Adams* (6 Q. B. 860), 1 Ch. Cases, 196; 2 *Preston on Estates*, 75.

Then the will says: "The other half of my said lands, &c., I leave in the hands of my executors and executrix;" and the question is, whether these words are equivalent to "I leave to my executors and executrix;" that is, whether the words, "in the hands of" are equivalent to the word "to." He leaves, using the word not as meaning that he suffers the land to remain where the law would place it (like the goods in the hands of the executors); but he prevents the land from descending to the heir, and leaves, or gives or devises it. If then the lands, like the goods, are left in the hands of the executors, are not the lands given or devised to them? for if not, how can they be in their hands if not vested in them? A power of sale would not place the lands in their hands: they would descend to the heir, contrary to the intent; and they are not devised to the church mentioned in any other or stronger terms than to the executors. *In the hands of* means in the executors, as if it were the lands, &c., I leave in the executors, &c. As to the disposing power with which the lands were so left, the word "proceeds" in the prior

clause may be material: the proceeds of half are given to the widow, the other half is left in the hands of the executors to pay debts—that is, out of the proceeds; and should there remain any surplus, it was to be given to the church, &c. Should there remain any surplus of what? of the lands and personal effects, or of the *proceeds* thereof? I think, taking the will throughout, it means the latter; the surplus of the *proceeds*, if any remained.

Then it may be said, if the devise is to the executors, what estate did they take, in the absence of any limitation; and would executors of executors take, or the heirs of the executors? The P. s. 4 W. IV. ch. 1, sec. 50 applies to the first point, independent of any inference to be drawn from the object of the devise and the necessity for the executors taking a fee in order to fulfil it—Williams on Executors, 628–9: that the executor of an executor may execute a power of sale—ib. 413–4.

But if the land is devised to executors, it would, as being a devise in trust, descend to the heirs of such executors. It is to be observed that the devisor does not say the land is left in the hands of his executors *to be sold*, but *to pay debts*; which carries with it the right to sell or dispose of it, as a fund or means of realizing funds to pay such debts.

On the whole I am by no means satisfied that the existence of debts is material to be proved in support of the defendant's title, because I think it was the intention of the devisor that his lands and goods should be both sold, and the proceeds be distributed as the will directs. It is not so clear, however, as to induce me to dispose of the case upon that ground, until it be ascertained whether there were debts or not: with that view, therefore, I think there should be a new trial, on payment of costs, as the proof ought to have been given at the last trial.

Per Cur.—Rule absolute.

vail. What the sheriff's bailiff said respecting the attachment was not objected to, but no warrant of attachment was produced. It was also questioned whether the Ewarts' receiving the proceeds of the sale was not a recognition of the trespass; but it appeared there had been no *Ri. Fa.* at their suit till after the trespass had been committed.

The case proceeded, and defendants called witnesses to impeach the bill of sale to plaintiff as fraudulent against the creditors of Stroud. It was stated that certain horses of Stroud's had been sold after the bill of sale, and the proceeds, £100 or more, received by plaintiff and applied by him, not in reduction of the sum secured thereby, but to another demand he claimed to have against Stroud in consequence of joining him in a promissory note for a debt he owed to Holmes & Co. That two executions having issued against Stroud's goods in January, 1855, plaintiff relieved him by joining with him in a promissory note for the amount. He also, about the time of the bill of sale, assumed another debt of his for £18, and gave a due-bill for the amount, at which time Stroud alleged that Tilt owed him, and Tilt denied it.

At the trial Stroud said the debt secured, £262, was justly due; but Stroud had remained in possession of all the goods both before and after the day appointed for payment, using and disposing thereof as he pleased. He had disposed of various things, of which plaintiff was aware; and finally he absconded in April, taking with him a horse and buggy, worth £75; and plaintiff declined replevying or following the goods Stroud had otherwise disposed of. Plaintiff, after he had gone, expressed anxiety about the creditors of Stroud, apprehending that unless some arrangement was made they would seize the goods, &c.

It was left to the jury to find for plaintiff, if satisfied the assignment from Stroud to him was honest, real *bond fide* for a debt due; a good consideration, and not collusive and fraudulent as a contrivance to cover the goods from executions. The various suspicious circumstances surrounding the case were remarked upon; such as the want of any change of possession; their being allowed to remain with Stroud,—who

disposed of portions of the goods to a large amount,—contrasted with his alleged indebtedness to plaintiff on other accounts, and the reasons he gave to explain and reconcile such conduct; also the plaintiff's conduct and conversations in reference to those transactions, including the non-application of the proceeds of goods sold to the debt secured, but to other and subsequent alleged liabilities of the plaintiff, assumed or incurred for Stroud.

The jury found for plaintiff £63 2s. 10d., being the amount applied to the execution of the Ewarts.

Rule *Nisi* to set aside the verdict as contrary to law and evidence, and the weight of evidence and the judge's charge; also for misdirection, and on affidavits filed.

The affidavits allege surprise at Stroud's evidence being inconsistent with his conduct in relation to the sheriff's sale, and the discovery of new material evidence.

The plaintiff filed a long affidavit in reply, strongly asserting the *bona fides* of the bill of sale, and denying the truth of many of the principal facts alleged in impeachment thereof.

Eccles shewed cause.

MACAULAY, C. J.—I think the rule should be made absolute for a new trial, without costs.

This is a joint action of trespass against the sheriff and two joint execution creditors; and the facts relied upon in proof thereof were, in the first place, the alleged seizure and sale of the goods under other writs of *Fi. Fa.* at the suit of other creditors of Stroud, such sale producing a surplus beyond the amount of those executions, out of which the sheriff paid a *Fi. Fa.* at the suit of the two Ewarts, issued and placed in his hands after the sale of the goods.

Now the Ewarts could not be made trespassers by relation or adoption of the sale under such execution, for the prior seizure and sale could not have been at their instance, nor for their benefit, nor did the *Fi. Fa.* entitle them to demand or the sheriff to pay over to them the surplus arising from such sale, nor do I see that his having done so renders the Ewarts or the sheriff liable as trespassers on that account.

Then it is said that the sheriff had previously attached the

goods at Ewarts' suit, under a warrant issued by them against the effects of Stroud, as an absconding debtor. But no attachment was produced or legally proved, nor did it appear when it was received or how it was executed by the sheriff, or that the Ewarts had interfered or directed the attachment of the goods in question under it. So far as it was spoken of by the witnesses, I infer that the sheriff had received a *Fi. Fa.* against Stroud's goods, and had seized them before any such attachment came to his hands; and there was no proof that the attachment was ever laid on so as to attach upon those goods, if that could be done while they were already under seizure in execution; and it seems the Ewarts obtained judgment by confession against Stroud, and not by the ordinary course of an attachment suit, though it appears to me that the confession was for the same debt or demand as the attachment, if any attachment really issued.

It was not proved that the goods had been in the first instance taken under an attachment at Ewart's suit before any *Fi. Fa.* came to the sheriff's hands; and if it was received after the goods had been seized under a *Fi. Fa.* its mere receipt would not make any of the defendants trespassers; and the sheriff could not and did not afterwards sell the goods under any such attachment, nor was it pretended that he did.

I do not see, therefore, how the sheriff or the Ewarts can be implicated as trespassers by reason of anything shewn to have been done under the attachment, assuming there was one—Wilson and another v. Trueman and another (6 M. & G. 236), Foster v. Bates (12 M. & W. 226), Vere v. Ashby (10 B. & C. 288).

The plaintiff, feeling these difficulties, offered at the end of the case to waive the action as against the Ewarts and restrict it to the sheriff, on the ground that he was liable at all events for the seizure and sale of the goods under whatever supposed authority.

I do not find proof that the sheriff himself did anything, or that the writs of *Fi. Fa.* spoken of were produced or duly proved, or any warrant under them given to Severs, the bailiff, who seized and sold the goods. Moreover, the execution of other writs was not the trespass opened or relied

upon by the plaintiff's counsel; and the damages are rendered against all the defendants, as if jointly liable by reason of the Ewarts' attachment and execution for the amount received by the Ewarts. The damages were rendered in respect of the proceedings had at the suit of the Ewarts, leaving the sheriff liable for anything he may have done independently of the Ewarts.

For anything done on behalf of the Ewarts the sheriff is not liable more than they, and the damages awarded are therefore unwarranted as against all.

Independently therefore of the question of fraud as against creditors in the bill of sale or mortgage set up by the plaintiff, the verdict seems to me not sustained by legal proof.

Rule absolute.

ELIGH V. WINTERS.

Trespass quare clausum fregit.

The plaintiff had workmen attending a certain steam saw-mill:—defendant being interested in getting saw-logs cut up, removed plaintiff's fireman and placed another man in his stead, also several of defendant's own workmen were added to those employed by the plaintiff:—owing to some mismanagement the boiler burst. At the trial the plaintiff was nonsuited for want of evidence of trespass. A rule *Nisi* was obtained to set aside the nonsuit.

Held, that there was sufficient evidence to go to the jury that defendant was a trespasser: that whether he was responsible as such for the injury done to the boiler depended on the nature and extent of his interference and how far he was implicated as a particeps in the acts which caused the explosion.

Trespass quare clausum fregit, and bursting a steam-boiler of plaintiff.

Pleas—Not guilty: Not possessed. Plaintiff nonsuited. Rule *Nisi* to set aside.

The question is, whether there was evidence for the jury to shew defendant a trespasser in fact; and if so, whether he was as such responsible for the accident to the boiler, which is laid as aggravation.

Cozens, for defendant, contended there was not.

Vankoughnet, M., for plaintiff, supported the rule.

There was evidence that in the plaintiff's absence defendant interfered with his workmen, placed men hired by him in addition to those left there by the plaintiff to work at the

steam saw-mill, being interested in getting logs cut up: that he withdrew the plaintiff's fireman from the boiler, and sent him to chop wood, and placed another man in plaintiff's service in charge, who mismanaged it, so that it exploded, causing great damage to plaintiffs' works—Reference was made to *Davison v. Wilson et al.* 12 Ju. 647; *Rosce* 520; *Ba. Ab. Trespass*; 2 *Rolls, Ab.* 567; *Gregory v. Piper*, 9 B. & C. 591; *Weston et al. v. Woodcock et al.*, 5 M. & W. 594; *Gordon v. Rolt*, 4 Ex. R. 365; *The King v. The Inhabitants of Morton*, 4 M. & S. 48; 16 *Pick*, 206.

MACAULAY, C. J., delivered the judgment of the court.

Was it wrongful: was defendant's entry wrongful; and if so a trespass; and if so, was he a particeps in exploding the boiler? I think the evidence shewed that the plaintiff was possessed, and that the defendant trespassed upon such possession. The injury to the steam boiler, &c., is laid as matter of aggravation. Whether the defendant is responsible therefor must depend upon the nature and extent of his interference, and upon how far he is implicated as a particeps in the acts which caused the explosion. The evidence goes to shew that he assumed authority over the plaintiff's workmen, and actually removed the plaintiff's regular fireman and placed another in charge of the boiler. If he was a trespasser on the close at the time he made such change, and if the substituted fireman was at the time of the accident acting in obedience to his orders and with his knowledge and consent, and if the whole was an illegal proceeding on his part, it is difficult to see on what ground he is exempted from responsibility for the consequences. How far all may have been done with the plaintiff's leave and license, or with the leave and license of his foreman or agent in charge, I shall not anticipate. On these pleadings and on this evidence I think the nonsuit should not have been granted.

Rule absolute.

M'GREGOR V. M'ARTHUR.

Evidence—Cross-examination.

In assumpsit for breach of promise of marriage the defendant is entitled to cross-examine plaintiff's own witness respecting the general bad character of the plaintiff.

Assumpsit for breach of promise of marriage. Judgment by *nil dicit*.

This was a rule *Nisi* to set aside the assessment of damages, the learned judge having refused to admit a witness of plaintiff to be asked on cross-examination questions respecting the plaintiff's general badness of character; and the question is, whether general bad character can be proved in mitigation of damages.

McPherson shewed cause. *Cozens* supported the rule. Reference was made to *Moor v. Adam*, 2 Chy. Rep. 198; S. C. 5 M. & S. 156, is quite in point.

MACAULAY, C. J., delivered the judgment of the court.

I think it was competent to the defendant's counsel to ask the plaintiff's witness the proposed question on cross-examination. I doubt not general bad character unknown to the defendant might support a plea in bar; but bad character might be shewn to some extent and yet fall short of a bar. It is not set up as a bar; and in seeking damages for a breach of contract in which character might be very material, the plaintiff may be expected to come prepared to meet any general disparagement of her character that might be attempted on cross-examination of her own witness, and to support a general good character. It is certainly laid down as a rule that *facts* going to establish a justification are inadmissible in mitigation of damages. However mere rumours or suspicions may be allowable, and it may be difficult to draw the line between them, still I think the general estimation in which plaintiff's character was held might be asked of her own witnesses, with a view to damages. An unfavourable answer might be rested upon mere rumour or general reputation; but specific, tangible facts that would support a plea in bar, or,—as in the case of *Foote v. Hayne* (C. & P. 545),—the

defendant may have heard more or less of the disparaging facts or rumours before making the promise; though it is to be observed that in that case the defence in bar was open to the defendant under the general issue, being before the new rules.

Entertaining a strong impression that the question ought to have been allowed, arising as it did, I think the rule should be made absolute, without costs.

Per Cur.—Judgment accordingly.

BOYD V. CHENEY.

In consequence of arrangements for uniting the Grand Trunk Telegraph Company with the British North American Association, the superintendent of the former company, on the 19th of December, 1854, wrote to its president and directors, expressing his readiness ("in order not to embarrass the company in its operations) to cease his connection with it on the 31st of December, 1854, on the company's guaranteeing to him the continuance of his salary at its present rate for six months from and after the 1st of January, 1855." On the same day the president wrote the following reply: "We are in receipt of your favor of this date upon the subject of your retiring from the office you now hold under us. We will be happy to meet you in the way set forth; and we hereby pledge ourselves to carry out the provisions mentioned in your behalf.—Signed, Geo. H. Cheney, President, on behalf of myself and the directors of the G. T. T. Company." *Held*, that the undertaking in the president's reply amounted to a personal guarantee: Richards, J., dissentiente.

Writ issued on the 28th of August, 1855.

Declaration alleges that—to wit, on the 1st of October, 1855—plaintiff, at the request of the Canadian Grand Trunk Telegraph Company, became and was superintendent of said company at a yearly salary of £400, payable in monthly instalments, and so continued to the 19th of December, 1854, and entitled to continue to the 1st of October, 1855. Defendant, in consideration that plaintiff, at the request of the said company, would retire and give up his said office on the 31st of December, 1854, promised plaintiff his salary aforesaid at the rate aforesaid, payable monthly as aforesaid, should be continued to be paid to him for six months from and after the first of January, 1855. Plaintiff avers that confiding, &c., he did relinquish and retire from said office; yet plaintiff has not received any part of said six months' salary from the said company or defendant, though requested.

Second count, more general: That in consideration that

plaintiff would retire from the said company, defendant promised to pay him six months' salary, &c.: that he did so, and yet defendant hath not paid, &c.

Pleas—First. Non-assumpsit. Second. Payment and issue.

At the trial the plaintiff produced two letters, as follows, in support of his case.

1.—“Canada G. T. Telegraph Office, Toronto, Dec. 19, 1854.

“*To the President and Directors of the G. T. Tel. Co.:—*

“Gentlemen,—In consequence of your having made certain arrangements for union with the Br. & Am. Telegraph Association, and part of the plan being a change in the mode of superintendence by which my services will no longer be required, I shall be happy (in order not to embarrass the company in its operations) to cease my connection with it on the 31st inst., upon the company guaranteeing me the continuance of my salary at its present rate for the six months next ensuing from and after January 1, 1855.

“(Signed), J. R. BOYD.”

2.—“Canada G. T. Telegraph, Office, Toronto, Dec. 19, 1854.

“*J. R. Boyd., Esq., Superintendent, Toronto:—*

“Dear Sir,—We are in receipt of your favor of this date upon subject of your retiring from the office you hold under us. We will be happy to meet you in the way set forth, and we hereby pledge ourselves to carry out the provisions mentioned in your behalf.

“I remain, Sir,

“Your obedient Servant,

“GEO. H. CHENEY, *President.*

“On behalf of myself and the directors of the G. T. Telegraph Company.”

Verdict for defendant, with leave to move.

This is a rule to enter it for plaintiff for £114 11s. 8d., being the amount charged by him, £85 8s. 4d. having been paid by the company.

Hagarty, Q. C., shewed cause, and referred to the P. S. 16 Vic. ch. 10 sec. 8, under which the defendant's company was formed, and contended there was no personal liability, only a pledge to carry out the proposal contained in plaintiff's letter; and that both plaintiff's letter and defendant's answer shewed both were contemplating the company

exclusively, of which company both were officers; and that defendant was not sued as one of the company, but as liable personally: that the company was liable to continue plaintiff in its services till October, 1855; and he agreed to retire at once on receiving its 'guarantee of six months' salary: that it does not appear the company refused to pay plaintiff; and if it did, his remedy would be against the company, not against defendant, whose only undertaking was that the company should guarantee, not that he would pay if the company did not—*Montreal Bank v. De Laŕe*, 5 U. C. Q. B. R. 362; *Healy v. Story et al.*, 3 Ex. R. 3, relied on by plaintiff, not in point; *Lucas v. Beale*, 10 C. B. 736 is in defendant's favor:—that plaintiff's proposal was to the company, and defendant's answer is accepted on its behalf—not more. The plaintiff did not offer or agree to retire on the defendant's guarantee; nor did he, in reply to defendant's assurance, accept it as a personal contract. If the defendant's answer bound the company, plaintiff must look to it; if not, it did not bind defendant to a collateral independent contract—it was not the object or intention of either party. Plaintiff expected the company to be bound, and the defendant's letter cannot bind both the company and himself in two separate liabilities—*Johnson v. Hamilton*, 13 U. C. Q. B. R. 211.

Reid, in reply, urged—that the only question was, whether defendant is liable personally: that his answer did not bind, nor profess to bind the company: that the plaintiff addressed the directors, and the defendant answered for himself and them—*Healy v. Story et al.*, 3 Ex. R. 3, is in point; and that the plaintiff may recover on the declaration as framed—*Kennedy v. Gouveia*, 3 D. & R. 503; *Appleton v. Binks*, 5 East, 148; *Bacon v. Dubarry*, 1 Lord Ray. 246; *Burrell v. Jonos et al.*, 3 B. & Al. 47; *Magee v. Atkinson et al.*, 2 M. & W. 440; *Higginson et al. v. Senior*, 8 M. & W. 834; *Bradlee et al. v. Boston Glass Manufactory*, 16 Pick. 347; *White v. Skinner*, 13 Johnson, 307. That the agent is bound if the principal is not, and he had no authority to attempt binding the principal as in this case—*Ambl.* 777; *Eaton et al. v. Bell et al.*, 5 B. & Al. 34; 1 M. & G. 845; *Duffee v.*

Mason, 8 Cowan 2. That he intended to bind himself, and not the company, collecting the intention from the language of his answer to plaintiff's letter.

MACAULAY, C. J.—In this case the Grand Trunk Telegraph Company, being bound to continue plaintiff in their service until October, 1855, but a new arrangement having been made for uniting it in May to the British North American Telegraph Company, by reason whereof his services were no longer required, he on the 19th of December, 1854, addressed a letter to the president and directors of the company, defendant being such president, proposing or offering to cease his connection with the company on the 31st inst. upon the company *guaranteeing* him the continuance of his salary for six months from 1st January, 1855. To which defendant answered on the same day, saying, "We are in receipt, &c.," of plaintiff's letter upon the subject of his retiring from the office "you now hold under us: we will be happy to meet you in the way set forth, and we hereby pledge ourselves to carry out the provisions mentioned in your behalf:" signed by plaintiff, president, on behalf of myself and the directors of the said Grand Trunk Telegraph Company; and plaintiff withdrew on the faith of it.

Now, on the 19th of December, it would seem that the Grand Trunk Telegraph Company was about being united with, if not merged in, another company, and plaintiff's services were no longer required: in that state of things he proposed to retire, upon the company *guaranteeing* him a continuance of his salary for six months. Now the term "guaranteeing" may be understood in two senses; that is, as meaning, according to the import of the word, that defendant's company before uniting should guarantee the continuance of salary to be paid by the united company, so as to create an obligation to pay, existing and binding upon the original company or upon such united company at the time of the union, for the separate and independent existence of the Grand Trunk Company was to cease; or the words may be understood to mean *paying*, or upon the company *paying*, &c. The objection to this reading is, that after the union another or joint company would alone be in a position to pay.

Then, to bind the Grand Trunk Company to such a guarantee the statute 16 Vic. ch. 10, sec. 8, requires certain formalities to be observed, admitting that such an obligation founded on such a consideration could be legally incurred by the company; but the necessary formalities were not observed on this occasion. In lieu thereof the defendant pledged himself to carry out the provisions mentioned in plaintiff's behalf. The provisions mentioned were in strictness perhaps the guarantee by the company of a continuance of his salary; in substance, that such salary should be continued and paid for six months. In the absence of anything further the defendant pledged himself that plaintiff's salary should be continued: he guaranteed it; and the plaintiff, acting upon his pledge, performed and executed the conditions on his part, thereby evincing his acquiescence in the defendant's pledge.

There was ample consideration for the defendant's promise; and the promise was that plaintiff's salary should be continued and paid for six months. The breach is non-payment or non-performance of such promise.

It is contended, and with great force, that the defendant is not liable, having acted only as an agent or organ of the company, without intention, expressed or implied, to become personally liable. It is very probable that if the defendant thought anything about it, he did not in his own mind intend or expect to be personally pledged or bound; and that to hold him liable would be contrary to his intention and to the expectation of both parties. Still, the legal effect of the correspondence must be determined by the language and the object in view; and the defendant did emphatically pledge himself (together with the directors), and signed such pledge on behalf of himself and such directors.—“We hereby pledge ourselves, &c.,” may, as against defendant, be thus read, “I hereby pledge myself, G. H. C. President, on behalf of myself;” including the original directors, does not make it the less a pledge of himself, &c., signed on behalf of himself, unless it would affect the question of intention; and the plaintiff relied and acted upon it. If he has no remedy against defendant, he has no remedy at all; and if the letters do in themselves constitute a binding contract between the parties personally, the plaintiff is entitled to the benefit of it.

If the defendant acted within the scope of his authority, it may follow that the company are liable to re-imburse him, or that he is entitled to contribution from the other directors. The plaintiff has no recourse against the former; and if an innocent party must suffer, it seems more reasonable that the defendant and the other directors should pay the plaintiff, than that he should go unpaid because they fail to carry out the provisions on his behalf which they pledged themselves to do. If the defendant and the directors incurred joint liability, of course defendant is solely liable in the absence of any plea of non-joinder.

There still, however, remains the difficulty of determining the intention as gathered from the tenor of both letters. *Bowen v. Morris* (2 Taunton 374)—*Morris*, who was plaintiff below, defendant here in error, was mayor of the corporation of The mayor, burgesses and commonalty of the borough of Carmarthen; which corporation owned lands in fee, which were sold at auction under certain conditions of sale as to deposit, payment, conveyance, &c., and the defendant below became the purchaser. Upon which there was written at the foot of the conditions—"The above mentioned premises, &c., were this day sold to David Bowen for £1000, subject to the conditions of sale within mentioned; and David Bowen, the purchaser or highest bidder of the said lot, and Thomas Morris, Esquire, the mayor of the said corporation, on behalf of himself and the rest of the burgesses and commonalty of the commonalty of the borough of Carmarthen, the vendors of the premises, do hereby mutually agree to perform and fulfil on each of their parts respectively the within conditions of sale.—Signed T. Morris, Mayor; David Bowen."

It was held the plaintiff below could not maintain an action of assumpsit in his individual capacity against Bowen for breach of this contract. It was argued on Bowen's behalf that the plaintiff below signed the contract not as principal but as agent for the corporation, and that if he did not individually contract with the defendant below, the defendant below did not contract with him individually; wherefore, if the corporation had refused to convey, Bowen would have had

no right of action against Morris—*Unwin v. Wolsey* (1 T. R. 674), *Appleton v. Binks* (5 East, 148).

Mansfield, C. J., remarked during the argument of Abbott, counsel for Morris, that the declaration avers that the defendant "in error undertook, not that he would convey, but that the corporation should convey; now the contract is, that the defendant in error, on behalf of himself and the rest of the corporation, undertook to fulfil the conditions of sale: thus far it is in words different from the contract alleged, that the corporation should convey; and it is singular if he were contracting for himself that he should add the words 'on behalf of the rest of the corporation.'"

In deciding that the contract did not bind the defendant in in error personally because he did not contract on behalf of himself personally but on behalf of the corporation, and that he acted merely as agent, said: "And although the corporation had not constituted the mayor their bailiff or agent by instrument under seal, so that he was not competent by that contract to bind the corporation, yet as the plaintiff in error signed it, perhaps the corporation might have sustained an action on this contract—*Pidcock et al. v. Bishop* (3 D. & R.

Healey v. Story et al. (3 Ex. R. 3)—the case of a promissory note:—"We jointly and severally," &c. *Parkins v. Connell* (5 Ex. R. 381) was an action on an Australian bank note:—"We the directors of the Royal Bank of Australia, for ourselves and the other shareholders of the company, jointly and severally promise, &c.: signed by four directors, defendant being one of them. He was considered personally liable—*Clay et al. v. Southern* (7 Ex. R. 717), *Nicholls et al. v. Diamond* (9 Ex. R. 154), *Edwards v. Cameron's Coalbrook Railway Company* (6 Ex. R. 269), *Halford v. Cameron's Coalbrook Railway Company* (16 Q. B. 442), *Jenkins v. Hutchinson* (13 Q. B. 752), *Jones v. Downman* (4 Q. B. 235), *Downman v. Williams et al.* (7 Q. B. 103), *Wilson v. De Zulueta et al.* (14 Q. B. 405), *Maclary et al. v. Sutherland et al.* (3 E. & B. 1), *Colley v. Smith et al.* (2 M. & R. 96), *Buckley ex parte In re Clarke* (14 M. & W. 469), *Mahony v. Kekule* (14 C. B. 396).

In reference to the case of *Bowen v. Morris* it may be said

the plaintiff made no contract with the defendant and directors to retire from the office legally binding upon him and such as they could enforce; wherefore, for want of reciprocity, there could be no contract to pay on their part, the essence of a contract being mutuality. The plaintiff's letter certainly did not contain proposals or overtures to contract with the defendant and directors personally, but it addressed them as representing the company. The reply of the defendant did not preserve the distinction or profess to be a mere response on behalf of the company. It contained an express pledge of the defendant and the directors, and implicitly undertook that if the plaintiff withdrew as he proposed, they would carry out the provisions mentioned in his behalf. But even if so it is said to amount to a mere proposal on the defendant's part, to which no reply was made by plaintiff, wherefore no contract could grow out of it; also that its terms do not import such a proposal, but a positive pledge in adoption of the plaintiff's proposal, which being addressed to the president and directors or the company as representing it, their answer should be regarded as the answer of the company, or as their answer on behalf of the company, and not as involving any personal assurance or undertaking whatever. The difficulty I feel is to reconcile that view with the defendant and directors pledging themselves, and the defendant signing on behalf of himself and them, instead of pledging the company and signing as president on behalf of the company. It looks as if a personal undertaking was intended: the defendant and directors pledge themselves to carry out the provisions mentioned, as if they had said, 'We adopt your proposal addressed to us, and pledge ourselves to carry out the provisions mentioned in your behalf,' meaning the continuance or payment of his salary for the next ensuing six months.

It is true he did not write back to say he retired on the faith of their personal pledge, but he did in fact retire on the faith of the letter, as I understand, and thereby evinced his intention to rely and act upon the defendant's letter as a sufficient security or pledge for the continuance of his salary, according to the legal effect of such letter, whatever that might be. It did not bind the company, but may bind

the defendant; and though some portion of the six months' salary was afterwards received from the company, such payments were consistent with the defendant's undertaking; and a failure to pay having afterwards occurred, I cannot but think the two letters and the plaintiff's withdrawal from the office under them constitute together sufficient proof of a personal engagement on the defendant's part that the salary should be continued, founded upon sufficient consideration. The plaintiff did retire in fact, rendering a promise or agreement on his part with the defendant and directors so to do unnecessary: it was a contract executed at once on his part; and the only question is, whether it was a contract executory on the defendant's part.

If the promise contained in his letter was executory on the part of the directors, it seems to me it must have meant that they should personally execute what the letter promises. It does not profess to bind the company without some further act on their part; and I apprehend the language adopted is not the usual style in which the board of directors, acting on behalf of the company exclusively, would be expected to express the undertaking of the corporation. The defendant, answering for himself and the directors, says: "*We hereby pledge ourselves,*" and then signs such pledge on behalf of himself and them.

If the defendant's liability should have been left to the jury as a question for them depending upon intention, I should readily acquiesce in a new trial, with costs to abide the event; but it appears to me to form a question of legal construction on the face of the letters; and, however doubtful such legal construction may be, the best opinion I can form is that the defendant, whether designedly or not, did assume a personal responsibility to the plaintiff, and that the verdict should be entered in his favor.

MCLEAN, J.—This action was brought to recover from the defendant a balance claimed by the plaintiff to be due to him on an undertaking of the defendant for a certain amount of salary at the rate of £400 per annum, to be paid to him for six months from and after the 1st day of January, 1855, in

consideration of the plaintiff leaving the service of the Grand Trunk Telegraph Company, of which defendant was president, and plaintiff the superintendent. The pleas are, non-assumpsit and payment.

There was no question at the trial as to the amount which the plaintiff was entitled to receive, if entitled to recover anything against the defendant in his individual capacity. He had been in the receipt of £400 per annum, or at that rate, as the superintendent employed by the company; and certain arrangements being in progress for union with another company, the plaintiff, on the 19th of December, wrote to the president and directors expressing his readiness, in order not to embarrass the company, to cease his connection with it on the 31st of December, 1854, on the company guaranteeing to him the continuance of his salary for the six months from and after the 1st of January, 1855. To this proposition an answer was returned on the same day, as follows: "We are in receipt of your favor of this date upon subject of your retiring from the office you now hold under *us*. We will be happy to meet you in the way set forth, and we hereby pledge ourselves to carry out the provisions mentioned in your behalf. —Signed, George H. Cheney, President, on behalf of myself and the directors of the Grand Trunk Telegraph Company."

It is on this undertaking the action is brought; and it is resisted by the defendant on the ground that it is not a personal undertaking, and therefore that he is not liable.

It appeared in evidence that a sum of £85 8s. 4d. had been paid to the plaintiff on account of the salary after the 1st of January, 1855, and that receipts had been given by the plaintiff as for so much received by him from the company.

The instrument was evidently intended to assure to the plaintiff the amount of salary for the time stipulated, in consideration of the plaintiff withdrawing from his situation, and thus relinquishing any claim which he might have for a year's income in consequence of his being engaged by the year. It is said that it was intended to be an undertaking in behalf of the company; but if so, it is somewhat singular that it was not made in such a shape as to be binding on the company. Under the 8th section of 16 Vic. ch. 10 it is provided that

tinuance of my salary at its present rate for the six months next ensuing from and after January 1st, 1855." There is no intimation here of any personal liability on the part of the president or directors as to the salary, or any suggestion as to anything they are to do, but an intention of a willingness to leave his employment upon the company's guaranteeing him the continuance of his salary for six months.

Up to this point there is no intention on his part apparently to seek any personal undertaking from the defendant or the directors. Let us now look at defendant's answer, to see if any such intent can be gathered from any reasonable and natural construction of its language. It commences by shewing it to have been written in the company's office, and in reply to the letter addressed to the president and directors, as the governing body of the corporation, on the business of the company, he says: "We are in the receipt of your favor of this date upon the subject of your retiring from the office you now hold under us." Now what does "us" there mean? the defendant and his co-directors personally, or the company which they represent? Surely the latter. Keeping this in view, we proceed with the letter—"We" (in the view suggested meaning the company) "will be happy to meet you in the way set forth, and *we* (the company) hereby pledge ourselves (the company) to carry out the provisions mentioned in your behalf: signed Geo. H. Cheney, president, on behalf of myself and the directors of the Grand Trunk Telegraph Company." The mode of signing by the defendant affords the strongest ground for an argument against him, being "on behalf of *myself* and the directors." If he only intended to bind the company, it may be urged, why does he say on behalf of myself? It seems to me the proper answer to this is, that the plaintiff addresses the president and directors as the organs of communication with the corporation, and the reply of the defendant to a letter thus addressed must be interpreted in the same way, and his signing in this view may be and should be read thus: "On behalf of myself, the president, and directors of the Grand Trunk Telegraph Co.: signed Geo. H. Cheney, president." If it had been so signed could it be considered as being anything more than the reply

of the governing body of the corporation by the same name in which they were addressed to an application made to the corporation? I think not. According to the plaintiff's letter he was making a proposition by which the company were to guarantee him the amount of his salary for six months after he should leave their service. Looking at it alone there is nothing to shew that he desired the personal undertaking of the defendant or of the directors, nor is there any reason suggested for his so desiring it, except that the corporation by their proposed arrangement might be merged in another company. But by the memorandum put in by Mr. Whitney it seems that he was secretary and treasurer of the Grand Trunk Telegraph Company from August 1854 to May 1855, and up to that time it cannot be said the corporation was dissolved.

What is there to shew that the plaintiff ever contemplated making any arrangement with the defendant or the directors individually? The letter of the plaintiff put in does not shew it, and the reply thereto of the defendant would not of itself make a complete bargain on his individual behalf, so that it could have been enforced at once without some further act of the defendant. If the acceptance of the plaintiff's offer had been such as to bind the company (as if the act incorporating the company authorized the president and directors *eo nomine* without seal, and by the signature of the president alone to bind the company) then I apprehend the agreement was complete from the acceptance of the plaintiff's offer, and could, if in other respects legal, be enforced. But if the letter of the defendant is held to create an agreement by which he is to make himself personally liable, what does he undertake? In my judgment, no more than this—viz., that the company would hold themselves bound to pay his salary for six months after the 1st of January, 1855, in the event of his leaving their service on that day: the provision mentioned by plaintiff, which defendant undertakes to carry out, being "upon the company's *guaranteeing him* the continuation of his salary, &c.

The declaration sets out the agreement in the first count to the effect that the defendant promised the plaintiff that his

salary at the rate of £400 a year should be paid to him for six months after the 1st of January, 1855. In the second count the undertaking stated in effect that the defendant would pay plaintiff his salary for six months after the 1st of January. In the view I take of the contract as a personal one, the agreement of the plaintiff is not properly set out in the declaration, and the defendant's undertaking would not necessarily imply the same damages for a breach of it as that stated in the declaration. Of course an absolute undertaking to pay plaintiff's salary, or that his salary should be paid, implies that whatever is due for salary shall be given as damages for a breach of the undertaking; but if he merely undertook that the company would agree to continue his salary for six months after he left their employment, the measure of damages for a breach of such a contract might be very different from what should be given on a breach of the contract set out either in the first or second count of the declaration.

I have looked at all the authorities referred to which are within my reach, and have arrived at the conclusion that the proper construction to put on the agreement is, that all parties intended that the company should agree to continue the plaintiff his salary at the rate of £400 a year for six months after (1st of January, 1855,) he should leave their employment. The mere fact that such agreement cannot be enforced for want of a seal, or being signed by the secretary, does not shew that it was intended to create a personal liability on the part of the defendant. I consider that the circumstance of the company having paid the plaintiff £85 8s. 4d. on account of his salary or allowance since the 1st of January, 1855, when he left the company, and for which he gave a receipt for so much money received from the company, is conclusive as to the view that all parties took of the agreement for more than two months after it was entered into.

On the whole I am of opinion that the verdict for the defendant should stand, as there was no undertaking entered into by the defendant under which he can be legally made liable for the plaintiff's claim; and even if there was any agreement by the plaintiff personally, it was not such as is

set out in the declaration. And if a new trial should be had it could only be on payment of costs.

I think much of the reasoning of the learned judges of the court of Queen's Bench for Upper Canada in giving judgment in *Johnson v. Hamilton* (18 U. C. Q. B. 211), which will apply in this case.

Rule absolute.

THROOP V. THE COBOURG AND PETERBORO' RAILWAY COMPANY.

Accretion of alluvial deposit—Ejectment.

This was an action of ejectment brought by the plaintiff against the defendants for the recovery of a portion of ground known as lot No. 17 broken front in concession B. of the township of Hamilton, now in the town of Cobourg, adjoining lake Ontario. The defence was limited to a small portion bordering upon the lake, which had been formed by the waves washing up sand, gravel and alluvial deposit, and thereby extending the bank inwards upon the lake. The deeds under which the plaintiff claimed title conveyed to the "bank of lake Ontario, thence along the said bank the several courses thereof." It appeared in evidence that so much alluvial deposit had been washed upon the shore and even upon the bank of the lake that all traces of the former bank were now obliterated, and could only be discerned by digging through the surface or new soil. The question was, whether the owner of the land described as adjoining the lake and extending to the bank had shewn a good title to the new soil which had thus attached itself to the bank of the lake.

Held, that as the owner of the bank would, by the encroachment of the lake, be the loser (the owner of the shore, consisting of the part between high and low water-mark, always being able to claim the shore whether it shifted or not), so he should be entitled to the benefit of the extension of the bank seawards, upon the principle that whoever would sustain the injury should also be entitled to the benefit: McLean, J., dissentiente.

Writ issued on the 28th of January, 1854. Ejectment for part of lot No. 17 broken front concession B. of the township of Hamilton now in the town of Cobourg, thus described:—commencing at the south-east angle of land now owned and occupied by John Coulter, on the west side of First-street in the town of Cobourg; then southerly along the west side of First-street, and on the course thereof to the north side of the pier or breakwater recently made and erected between the two piers of the harbor of the town of Cobourg; then westerly along the north side of the said pier or breakwater two chains fifteen links; then northerly, parallel with First-street, to the south-west angle of said land owned and occupied by said John Coulter; then easterly along the southern boundary of

said Coulter's land two chains fifteen links, more or less, to the place of beginning.

On the 9th of March, 1854, defendants appeared, and limited their defence to the premises thus described:—commencing on the west side of First-street at a point seven chains and ninety-eight links south from King-street; then southerly in the same course as the west side of First-street to the north side of the pier or breakwater aforesaid; then westerly along the north side of the said pier or breakwater two chains fifteen links; then northerly, parallel with the said continuation of First-street as aforesaid until the same intersects a line from the place of beginning drawn south seventy-four degrees west; then easterly along the said last mentioned line to the place of beginning.

The government grant is dated the 29th of January, 1855, to Nathaniel Herriman, all that, &c., containing by admeasurement 240 acres, with allowance for road, more or less, being lot No. 17 in the broken front of the township of Hamilton, thus described:—commencing in front upon lake Ontario at the south-east angle of the said lot; then north sixteen degrees west one hundred and twenty chains more or less, to the allowance for road in the front of the first concession; then south seventy-four degrees west twenty chains more or less to the limit between lots Nos. 17 and 18; then south sixteen degrees east to lake Ontario; then north-easterly along the water's edge to the place of beginning.

It appeared or was admitted at the trial that by deed of bargain and sale, dated the 16th of July, 1808, Nathaniel Herriman conveyed to Nathan Williams ninety acres more or less, composed of the front part of lot No. 17 in the broken concession, with the lands in front of the said lot, thus described:—commencing in front upon lake Ontario at the south-east angle of the said lot No. 17; then north sixteen degrees west forty-five chains, to the lands sold to Moses Ally; then south seventy-four degrees west twenty chains more or less, to the limits between lots Nos. 17 and 18; then south sixteen degrees east forty-five chains more or less, to lake Ontario; then north-easterly along the water's edge to the place of beginning.

Nathan Williams conveyed to John Ross on the 16th of

January, 1811. By deed of bargain and sale, dated the 11th of April, 1812, John Ross conveyed to Timothy Kittridge two acres and one rood, more or less, being all that certain parcel or tract of land lying and being situate in the township of Hamilton, containing by admeasurement two acres and one rood, be the same more or less, being composed of part of lot No. 17 in the broken front adjoining lake Ontario, which said parcel or tract of land is butted and bounded, or may be otherwise known as follows, being part of lot No. 17 in the broken front adjoining lake Ontario, thus described:—beginning at the bank of lake Ontario at the south-east angle of the said broken front; then north sixteen degrees west two chains thirty-two links, more or less, to the south-east angle of Elijah Buck's land; then south seventy-four degrees west eighty-eight links; then north sixteen degrees west five chains and sixty-eight links; then south seventy-four degrees west one chain fifty links; then south one degree nine minutes east eight chains twenty links, to the bank of lake Ontario; thence along the said bank the several courses thereof to the place of beginning; and also all hereditaments and appurtenances unto the said parcel or tract of land belonging or in anywise appertaining.

By deed of bargain and sale, dated the 22nd of April, 1812, John Ross conveyed to Elijah Buck part (off the eastern side) of the land in front of lot No. 17 in the broken concession of said township of Hamilton, containing by admeasurement two roods more or less, thus described:—beginning at the north-east angle or corner of Timothy Kittridge's land, then south sixteen degrees east five chains sixty-eight links; then north seventy-four degrees east eighty-eight links to the road; then north sixteen degrees west five chains sixty-eight links; then south seventy-four degrees west eighty-eight links to the place of beginning.

By deed of bargain and sale, dated the 22nd of March, 1813, John Ross conveyed to James Williams eighty-eight acres and a half, including three small parts already granted out of the said tract—namely, one to Elijah Buck, containing half an acre, one to Timothy Kittridge containing two acres and a quarter, and one to Jacob Fering containing one

acre; the tract being the front part of lot No. 17 in the broken front or concession with the land in front of the said lot thus described:—beginning in front upon lake Ontario at the south-east angle of the said lot; then north sixteen degrees west forty-five chains, to the land sold to Moses Ally; then south seventy-four degrees west twenty chains more or less, to the limits between lots Nos. 17 and 18; then south sixteen degrees east forty-five chains, more or less, to lake Ontario; then north-easterly along the water's edge to the place of beginning.

By deed-poll, dated the 23rd of April, 1816, Timothy Kittridge and wife conveyed to Ebenezer Perry, his heirs and assigns, for ever, all, &c., being, &c., part of lot No. 17 in the broken front adjoining lake Ontario, and thus described:—beginning at the bank of lake Ontario, at the south-east angle of the said broken front, then north sixteen degrees west two chains and thirty-two links, more or less, to the south-east angle of Elijah Buck's land; then south seventy-four degrees west eighty-eight links; then north sixteen degrees west five chains and sixty-eight links; then south seventy-four degrees west one chain fifty links; then south one degree nine minutes east eight chains and twenty links to the bank of lake Ontario; thence along the said bank the several courses thereof to the place of beginning: *habendum* to said Perry, his heirs and assigns, to the only proper use and benefit of said Kittridge, his heirs and assigns for ever.

On the 11th of June, 1816, James Williams conveyed to John Monjean four acres and three-quarters of land in the township of Hamilton, being part of lot No. 17 in the broken front concession of the said township, and commencing at the north-east angle of lot No. 2, belonging to Ebenezer Perry; then south eighty-two degrees west six chains twenty-five links; then south eight degrees east eight chains to lake Ontario; then north eighty-two degrees east along the shore of the said lake five chains twenty-five links; then north three degrees west eight chains twenty links to the place of beginning: witnessed by Buck and Kittridge.

By deed-poll, dated the 11th of January, 1819, Ebenezer

Perry and wife conveyed to Elijah Buck, his heirs and assigns for ever, all, &c., containing by admeasurement two acres and one rood, more or less, being, &c., part of lot No. 17 in the broken front adjoining lake Ontario, described as follows:—beginning at the bank of lake Ontario, at the south-east angle of the said broken front; then north sixteen degrees west two chains and thirty-two links, more or less, to the south-east angle of Elijah Buck's land; then south seventy-four degrees west eighty-eight links; then north sixteen degrees west five chains and sixty-eight links; then south seventy-four degrees west one chain fifty links; then south one degree nine minutes east eight chains and twenty links, to the bank of lake Ontario; thence along the said bank the several courses thereof to the place of beginning: *habendum* to said Buck, his heirs and assigns, to the use of said Perry, his heirs and assigns forever.

By deed of bargain and sale, dated the 21st of May, 1819, James Williams conveyed to Jeremiah Lapp all, &c., containing eighty-eight acres and a half, being, &c., and described as in the deed of the 22nd of March, 1813 (ante page, 511), except that no mention is made excepting the three small tracts therein excepted, or the four acres and three-quarters conveyed to Monjean on the 11th of June, 1816, or one acre and a half to James Ross on the 9th of April, 1817.

By indenture of bargain and sale, dated the 16th of November, 1819, John Monjean conveyed to Elijah Buck all, &c., being part of said lot, &c., containing two roods and twenty-one rods, specially described as commencing at a mark on a building of said Elijah Buck, a part of which was on the said now sold piece of land by M. to B.; then south ninety-six (*quære*, sixteen degrees) degrees west one chain more or less, to the centre of the creek; then south five degrees thirty minutes east seven chains eighty links; then east seventy-one links; then north sixteen degrees west seven chains seventy-five links, to the place of beginning, containing two rods and twenty-one roods, more or less.

On the 16th of September, 1820, John Monjean conveyed to Francis Trudeau all, &c., being part of lot No. 17, broken front concession, township of Hamilton, containing

by admeasurement three acres, three roods and thirteen poles, butted and bounded as follows:—that is, commencing on the main road leading to York at the corner of the fence then owned by Alexander McDonnell; then south eight degrees east seven chains ninety-four links to lake Ontario; then north-easterly along the shore of lake Ontario three chains six links, to the land owned by Elijah Buck; then north one degree thirty minutes west eight chains twenty links to the road; then along the said road six chains fifty links to the place of beginning. Also that certain other parcel, &c., containing eight acres, more or less, being part of lot No. 17 broken concession B. of said township of Hamilton, butted and bounded as follows:—commencing in the rear of the said concession on the allowance for road at the north-west angle of lot No. 4 owned by James Ross and sold by him to James Williams; then south eighty-six degrees west nine chains and a half, more or less, to the limit between lots Nos. 17 and 18; then south sixteen degrees east eleven chains, more or less, to lake Ontario; then easterly along the shore of said lake eight chains and a half; then north eight degrees west eight chains and a half, more or less, to the place of beginning.

Indenture of bargain and sale, dated the 9th of August, 1823. Elijah Buck conveyed to Benjamin Throop part of said lot, containing twenty-seven perches, specially described: commencing at a post in the centre of a small brook on the division-line between the property of John Monjean and Elijah Buck, on the south side of the road then travelled between Toronto and York; then south five degrees thirty minutes east along the said division-line one chain ninety-eight links to a post, planted with glass, crockery and stones at the bottom, the place of beginning; then north eighty-four degrees east one chain sixty-six links, to where a post is planted at the west side of Potash-street; then south nine degrees thirty minutes east one chain, to a post; then south eighty-four degrees west one chain seven links, more or less, to the division-line between the said property of Monjean and Buck, &c.; then north five degrees thirty minutes west along said division-line, one chain more or less, to the place of beginning.

Indenture, dated the 5th of June, 1824. Francis Antoine LaRocque and James Gray Bethune, rear fifty acres of said lot.

By indenture of bargain and sale, dated the 23rd of February, 1828, Elijah Buck, conveyed to Benjamin Throop all, &c., containing by admeasurement one acre of land, more or less, being part of lot No. 17, &c., thus described:—commencing on the north-west corner of the lands owned by the said Benjamin Throop, where stands a pot-ashery and distillery; then north eighty-four degrees east one chain sixty-six links to where a post is planted on the west side of First-street; then north nine degrees thirty minutes west twenty-nine links; then south eighty-four degrees west one chain sixty-five links; then south five degrees thirty minutes east twenty-nine links, more or less, to the place of beginning. Also, commencing at a post planted on the west side of First-street at the south-east corner of the said land belonging to the said Benjamin Throop; then south nine degrees thirty minutes east five chains, more or less, to the high water-mark; then south seventy-four degrees west two chains fifteen links to the land owned formerly by Monjean; then north five degrees thirty minutes west five chains thirty-one links more or less, to the aforesaid land belonging to the said Benjamin Throop; then north eighty-four degrees east to the place of beginning; reserving the south-west corner of that part of the last described lot of lands which is fenced in,—a piece of ground three rods in front and six rods in depth,—together with free access in front of the said three rods to the lake for all boats, vessels and persons.

November 20, 1837. Will of Benjamin Throop, devising all his estate to his wife, Lavinia, in fee. Probate dated the 30th of September, 1841.

December, 17, 1844. Quit claim deed.—Angus Bethune, heir of James G. Bethune, to Henry Covert, the aforesaid rear fifty acres and three acres, three roods and thirteen poles, running as described to lake Ontario; then north-easterly along the shore of lake Ontario three chains six links to the land owned by the late Elisha Buck, &c. Also, eight acres of said lot No. 17, bounded as described by running to lake Ontario; then easterly along the shore of said lake eight chains and a half, &c.

March 22, 1852. Deed-poll.—Henry Covert conveyed to defendants part of said lot No. 17, containing by admeasurement four acres and three-quarters more or less, thus bounded:—commencing on the east side of Third-street, town of Cobourg, at the fence south of the premises then occupied by William Calcutt; then southerly along the east side of said street to the quay at the harbor; then easterly along said quay to First-street; then northerly along the west side of said First-street five chains forty links; then westerly in a direct line to the place of beginning, the same having been selected by the said company for their railway.

April 30, 1853. Jeremiah Lapp to Archibald Macdonald, of all his right, &c., being part of said lot No. 17, commencing at the south-east angle of said lot at the water's edge of the lake; then north sixteen degrees west along the west side of Division-street, to a point two chains and thirty-two links from the south-east corner of a piece of land sold by John Ross to Elijah Buck in the year 1812 at the north-east corner of the said broken lot where the bank of the lake was in that year; then westerly along the bank of the lake as it was then to Third-street; then southerly along the east side of Third-street to the water's edge; then easterly along the water's edge to the place of beginning.

May 5, 1853. Archibald Macdonald to Henry Covert, of the tract lastly above described.

There was evidence that by accretion, promoted by the erection of piers in constructing the harbor at Cobourg, the distance from the margin of lake Ontario as it was in 1812 or 1816 and as it is at present is between three and six chains, but that the line of the old bank can be still traced, or is visible to the eye.

That there was formerly a beach of about one chain south of the old bank, and in times of storms and high water the swell had been known to wash over the bank, but in ordinary weather the waves seldom reached within half a chain of the bank.

There was also evidence that after Benjamin Throop became possessed he erected a fence along the edge of the bank, according to some witnesses, and afterwards another at the bottom of it where the beach came up to, according to

others ; and one witness said it was so near the lake that it was washed down in a storm, and that he had fenced as far south as he could. The height of this bank was not particularly stated, but it seems to have been low, and though well defined formerly, still nearly on a level with the beach or termination of the sea-wash, which occasionally rolled up to its base, and ultimately caused it to be covered over with accumulated sand and other deposit. The old line of bank was proved to be correctly laid down in a plan of Roach, a surveyor, based upon the information of old inhabitants, who confirmed its accuracy as witnesses. No one had until recently actually occupied the land between Throop and the water's edge, except that persons occasionally landed goods and laid lumber, &c., upon it for temporary convenience, but no possession of the soil was taken or retained.

There was evidence that in fact Throop had erected a fence twenty years ago and more below or south of the bank spoken of as near the water-line as he could go ; in short, that he possessed to the lake. The bank was said to be lower west-westerly than to the east, but that there was a visible bank separate from the beach. The beach was said to have been looked upon as public property. In short, there was conflicting evidence upon the fact of actual possession by Throop, those under whom he held south of the defined bank said to have existed in 1812 and 1816.

The defendants endeavored to establish that a part of the broken front lot No. 17 remained south of such bank and not included in the deeds from Ross to Kittridge, and from him to Perry and eventually to Throop. The tract in dispute is in front of the west part of the land so conveyed and to the west of that tract, bounded on the east by a street called First-street.

It was admitted the plans of the railway had not been deposited in the office of the Clerk of the Peace as required by the General Railway Act 14 & 15 Vic. ch. 51, sec. 10-11 ; 16 Vic. ch. 179, sec. 4 ; 18 Vic. ch. 36, until the 28th of January, 1854, the day on which this suit was commenced ; and that notice of such deposit was published in the Cobourg "Star" some days subsequent.

J. H. Cameron, Q. C., for defendant, moved a nonsuit on the grounds:—First. That though the patent granted the lands to the water's edge of lake Ontario, the deeds under which plaintiff made title and claims the accretion only conveyed to the bank of the lake, and not to the water's edge. Second. That by the deeds from Kittridge to Perry and Perry to Buck the lands are to be held to the use of the grantors, and so impart no title to the grantees. Third. That defendants, having purchased of Covert, paid value and entered into possession, ejectment cannot be maintained against them, being authorized under the General Railway Act to enter into and take lands for the railway, subject to compensation as therein provided.

Leave to move a nonsuit on these points was reserved, and the case left to the jury by McLean, J., who told them the plaintiff must recover on the strength of her own title; that the verdict should be for defendants unless a good title was shewn: that plaintiff could only hold under the deeds put in according to the descriptions therein contained, and that unless they extend to the water's edge the land which had formed in front could not be claimed by her: that both plaintiff's and defendants' witnesses had established that there was a bank marking the division between the soil and the beach or shingle, and that there was a beach of several rods between the bank and the water's edge; and that if plaintiff's deeds only extended to the bank, then the beach and all the ground formed south of the bank must belong to some one else: that the deeds under which plaintiff claimed commenced at the bank of lake Ontario at the south-east of lot No. 17, and that the west boundary only runs to the bank, and that there was no such possession shewn in plaintiff or any other person of the beach as could affect the title: that unless the south-east angle of the lot on the water's edge was considered as the place of beginning, there could be no question that plaintiff must be limited to the bank wherever that was, and that any beach or land formed south of it could not be recovered as appurtenant to that which plaintiff claims.

Defendants' counsel objected, that the place of beginning at the bank of lake Ontario at the south-east angle of lot

No. 17 was a question of law, and as such should have been decided by the court, and not left to the jury.

The jury found for plaintiff.

In Easter Term, 1854, *J. H. Cameron, Q. C.*, obtained a rule, &c., to set aside such verdict, and enter a nonsuit, or for a new trial, as being contrary to law and evidence, for misdirection and on affidavits filed.

The only affidavit is of Simon Fennell—not called as a witness—alleging that both Throop's fences were on the top of the bank, and both he and Buck told him the bank was their boundary in front. Why not called as a witness not explained, though present at the trial.

The affidavit is neutralized by contra affidavits in reply.

P. Vankoughnet, Q. C., shewed cause in Trinity Term, August, 1854, 18 Vic., and contended—First. That the plaintiff's deed and possession did cover the *locus in quo*. Second. And that ejectment does lie;—being the two grounds relied upon in moving the rule: that the patent clearly bounded the broken front, lot No. 17 by the water's edge of lake Ontario, and that the deeds for a portion thereof from Ross to Kittridge, and from Kittridge to Perry, and from Perry to Buck, and from Buck to plaintiff's testator, though the term bank was used in the first three of them, evidently meant to bound the tract by the front of the lot as proved by the place of beginning at the south-east angle of the lot: that commencing on the lake on the east side the side-line must go to the lake, in order that the south or front line may return to the place of beginning; in short, that the bank of the lake and the lake are synonymous: that the possession corresponded with the boundary contended for as proved by the evidence; and that referring to the evidence of Kitson, Roach and others, the plaintiff was entitled to the land in question by accretion, and which could only accrue to the front of the lot, no part of which was left or intended to be left between the land conveyed to Kittridge, &c., and the waters of the lake. He cited *Do ex dem. Macdonald v. Cobourg Harbor Company*, M. T. 7 Vic. as to the right to accretion, which however was not disputed; 3 Kent's Com. 514, 7th edition *Parker v. Elliott*, 1 U. C. C. P. R. 470, where the law is well

stated : that defendants shewed no valid title at all events : that no question was properly raised as to defendants' privilege under the statute ; and all depended upon the effect of the deeds and title on which plaintiff relied.

Cameron in reply contended, that neither the deeds from Ross to Kittridge, &c., nor from Buck to Throop included the front of lot No. 17 down to the water's edge, as evinced by the term bank in the former and the reservation at the end of the latter—*Clark v. Bonnycastle*, 3 U. C. O. S. 557. He also referred to and relied upon the description contained in the other deeds in evidence as aiding such construction and shewing the intention to have been so.

Dr. Connor, Q. C., on same side, argued that there could have been no reason for varying the language in the deed from Ross to Kittridge from the government patent as to the front or south boundary, if used in both with the same intention. He referred to *Clark v. Bonnycastle*, as shewing that bank and edge of the bank and water's edge were not equivalent or identical : that the accretion was not to the bank, of which there were several rods when the patent issued, and therefore did not accrue to the plaintiff—In *Re Hull and Selby Railway*, 5 M. & W. 328 ; *Llewellyn v. Earl of Jersey*, 11 M. & W. 189.

McLEAN, J., delivered the judgment of the court.

This case was tried before me at the last spring assizes at Cobourg, and a verdict was rendered for the plaintiff. The premises in dispute consisted of a piece of ground formed by accretion from the action of the lake since the construction of the piers of the Cobourg harbor ; and the question was, whether the plaintiff's premises extended so far towards the lake that the accretion must be deemed appurtenant to them, or whether there was any property between the plaintiff's premises and the lake, to which the accretion would attach.

The land in controversy being very valuable from its position and the use made of it by the defendants in the construction of their railway, it is very important, in order that the right may be established upon clear and sufficient grounds, that all the facts should be distinctly elicited.

The facts which appeared upon the trial before me did not, in my judgment, appear to establish the plaintiff's right to recover; and there are some points on which it appears very desirable to the Chief Justice and my brother Richards to obtain further and more explicit information. With my view of the former verdict, I have no difficulty in concurring in granting a new trial, on payment of costs.

This case was tried a second time before Mr. Justice Burns, with a view to the more distinct ascertainment of certain facts, when the plaintiff made title under the following deeds to two distinct but adjoining parcels of land:—First. From the grantee of the Crown to Elijah Buck for the easterly portion of the land claimed, under the deeds from Herriman and Williams, Ross, Kittridge and Perry. Second. For another portion—the westerly—under those from Ross to Kittridge of eighty-eight acres, Williams to Monjean of four acres and three quarters, and from Monjean to Buck; and those from Buck to plaintiff, and the will of Throop to plaintiff.

Defendants claim to hold under the deeds from Williams to Lapp and from Monjean to Treaudeau.

The evidence at the last trial does not appear to have materially altered the facts as they before appeared. It shews more clearly than before that the bank spoken of has been covered over by sand or alluvial deposit, and is not now itself visible, though the course of it can be traced; the line between the earth that formed the bank and the sand of the lakeshore can be found by digging down to it. The evidence as to possession was as strong in the plaintiff's favor as before, though there was conflicting evidence on the subject.

The evidence was fully taken by the learned judge, but no questions were left to the jury as to the facts, especially in relation to the bank, its former height, present condition, &c., as we could have wished.

The jury again returned a verdict for the plaintiff; and in Easter term last a rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or why a verdict should not be entered for the defendants, or a distributive verdict, pursuant to leave reserved.—Cause was shewn during the same term.

MACAULAY, C. J.—The right of the owners of the front part of lot No. 17, as described and granted in the government patent therefor, to the land formed since such grant in front of said lot, by the process of alluvion and accretion; or that a tract or piece of land between the original and the present water-lines has been so formed by alluvion and accretion as distinguished from dereliction have not been disputed, each party being alike interested in treating the tract in question as formed by alluvial deposit and as by imperceptible accretion, extending the front of the lot, treating the water's edge of lake Ontario for the time being as as its front or southern boundary.

The right of the Crown to the space thus gained from the lake as having been land covered with water and therefore in the Crown, and not granted by the patent in 1806, but capable (as said) of being identified by the still visible traces of the old bank, might be open to questions according to what is said in *The Attorney-General v. Turner* (2 Mod. 106; S. C. 2 Lev. 171; S. C. Ray. 241), *Smart v. The Corporation of Dundee* (8 Bro. Par. Ca. 119), *Smith v. Her Majesty's Officers of State for Scotland* (13 Ju. 713, House of Lords, 1849), *Schultz on Aquatic Rights* (116, 126-7, 137-8), *Hale De Jure Maris*, 13, 28, 36.

The preferable claim, however, of the owner of the adjoining lands is supported both as to the right and the fact under the evidence by such cases as *The King v. Lord Yarborough* (3 B. & C. 106; S. C. 4 D. & R. 790; S. C. 5 Bing. 163; S. C. 2 Bli. N. S. 147; S. C. 1 Dow. N. S. 178), *Scrutton v. Brown* (6 D. & R. p. 536), *Blundell v. Cattterall* (5 B. & A. 268, 298), *In Re The Hull and Selby R. R. Co.* (5 M. & W. 327), *Calmadie v. Roe* (6 C. B. 879), *Duke of Beaufort v. The Mayor of Swansea* (8 Ex. R. 413), *Doe dem. MacDonell v. The Cobourg Harbor Company* (U. C. Q. B., M. T. 1843), which is quite in point and relates to this very lot.

In the first mentioned case—*The King v. Yarborough*—it was decided in the Court of Queen's Bench, as to the fact that the land in question (being formed gradually by ooze and soil, &c., deposited by the sea, and without the increase being perceptible when actually going on, although visible from year to year for a long series of years) could not be

said to have been left by the sea, and therefore not derelict as distinguished from alluvious deposit. And it was afterwards determined in the same case in the House of Lords as to the law, that being so formed by slow, gradual and imperceptible degrees, the soil accrued to the owner of the adjoining manor, being the defendant, and did not belong to the Crown.—See also Schultz on Aquatic Rights (116, 126-7, 136-7). In this and the other cases above cited, the doctrine as laid down in *Hale De Jure Maris*, was much discussed, and the correct meaning of some passages apparently explained. In the case of *The King v. Lord Yarborough* the increase had been caused by the joint action of the river Humber and the sea, to the extent of 100 to 140 or 150 yards, within the space of fifteen to twenty-seven years, and from 80 to 50 yards within the last five years, the whole containing about 450 acres.

The distinction between land made and land left by the sea—that is, between reliction and alluvion—was fully recognized in this case, and much stress was laid upon the force and meaning of the word “imperceptible,” and two passages in *Hale's De Jure Maris*, part 1, ch. 4, page 14, were cited. Abbott, C. J., in reference thereto said: “That very learned writer speaks of land gained by alluvion as belonging generally to the Crown, unless the gain be so insensible that it cannot be by any means—according to the words of one of the passages, or by any limits or marks, according to the words of the other passage—found that the sea was there. But that in those passages he was treating of the legal consequence of such accretion without explaining what ought to be considered as accretion insensible or imperceptible in itself (or as said by the civil law, so that it cannot be perceived what was added in a moment of time—Schultz, 116), but that he considered that as being insensible of which it could not be said with certainty that the sea ever was there.” The learned Chief Justice further said: “An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become by gradual increase perceptible by such marks or limits at the end of a century, or even forty or fifty years; for it is to

be remembered that if the limit on one side be land, or something growing or planted thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day (see my remark on this passage in *Roddy v. Moffatt*); and therefore," he said, "these passages from the work of Sir M. Hale are not properly applicable to this question (meaning the issue of fact); and considering the word 'imperceptible' in this issue as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

I mention the above because the decision of the Court of Queen's Bench left undetermined the legal right to the land gained by accretion, and to say that from the ultimate decision as to the legal right in the House of Lords I infer that the legal test is not whether it can be ascertained with certainty that the sea ever was there, and so the increase imperceptible in that sense of obliterating all former traces of what it had been to entitle the owner of the land adjacent to hold the same as an accessorial perquisite, but that the legal test is whether the increase was gained by alluvial accretion or was derelict land left by the sea. And the distinction is material in the present case, because there is evidence that traces of the bank of the lake as it existed in 1806, 1812 or 1816 cannot only be found by digging, but is still visible to the eye; wherefore, if the test is to be as Sir M. Hale states, that land gained by alluvion belongs to the Crown, unless the gain be so insensible that it cannot by any means or by any limits or marks be found that the lake was there, and not whether the land accrued by alluvion deposit as distinguished from reliction or derelict lands left by the lake, it would probably follow that on this ground, independently of other considerations, the land in question would appertain to the Crown as forming part of the bottom of the

lake. But I do not take such to be the understood rule of English law relating to property of this kind at the present day, but that if the gain be by alluvion and accretion it belongs to the owner of the lands to which the increase becomes permanently attached, on the principle (amongst others) that being liable to suffer loss by the encroachments of the sea or other public waters, he is entitled reciprocally to the benefit of accretion excluding the waters: and this it is said by the law of nations—Vattel 121; Callis. 51; 2 Blackstone, 262; 1 Steven's Com. 419, note p.

In the matter of the Hull and Selby Railway Company it was held that if the sea or an arm of the sea by gradual and imperceptible progress encroach upon the lands of a subject, the land thereby covered with water belongs to the Crown. In that case *Hale de Jure Maris*—Hargrave's Law Tracts, p. 15—was cited, as follows: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding on the former land the same can be known, though the sea leaves this land again, or it be by art and industry regained, the subject doth not lose his property."

Alderson, B., said: "Lord Hale in his remarks on the *Abbot of Ramsay's* case, ib. 29, seems to suppose the right reciprocal, and that the loss goes to the party to whom the benefit would go."

Lord Abinger, C. B., said: "In all cases of gradual accretion which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs to which the accretion is added, and, *vice versa*, a gradual access of the water made the land then between high and low water-mark the property of the Crown."

Alderson, B., said: "Suppose the Crown, being owner of the foreshore—that is, the space between high and low water-mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible; in that case the right of the grantee of the Crown would go forward with the change.

On the other hand, if the sea gradually covered the land so granted, the Crown would be gainer of the land." The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all: meaning by the last passage, I apprehend, be taken as if a course of progress had never existed, or as if it had always been in *statu quo*. This case bears upon several points. I mention it as using the word 'adjoining,' and as sustaining the rule of reciprocity, both of which are material in my view of the present case.

It likewise omits any distinction between the right to accretion by lords of manor or other proprietors of large tracts of land bounded by the sea or sea shore, and by the owners of small tracts thus bounded, which I mention because the distinction is taken in some of the books; and on the whole I cannot say that such enlarged or curtailed proprietorship makes any substantial difference in the application of the rule to lakes and rivers in this province, considering that the rule depends upon the right of proprietorship in the adjacent lands when extended by accretion, unless something peculiar or local calls for the application of a more restricted or different rule.

Calmadie v. Rove (6 C. B. 861-2) speaks of lands adjoining the sea shore, and likewise of such shore being parcel of a manor, as distinguished from its being held in gross or by separate grant, &c., which latter seems to have been considered clear.

The Duke of Beaufort v. The Mayor of Swansea also speaks of the sea-shore or land between high and low water-mark, being parcel of the adjoining manor—*Ba. Ab. Prerog*, *Blundell v. Catterall* (5 B. & A. 284, 302), *Ball v. Herbert* (3 T. R. 253-63), *Doe dem. Macdonell v. Cobourg Harbor Company* (U. C. Q. B. R. Mich. Term, 1843).

In another important case—*Scratton v. Brown* (4 B. & C. S. C. 6 D. & R. 536)—it was there held that the right of soil in the sea-shore might be granted, and that it constituted a moveable freehold, and that the portion of land which from time to time or for the time being lay between high and low

water-mark passed to the grantees. It was a case of encroachment by the sea. In this case the defendants had at different times taken stone, &c., from the sea-beach and sea-shore adjoining the plaintiff's manors, some from the space between high and low water-mark, and some above high water-mark. The defendant justified under the grantee of the shore; and at the trial it was proved that since the date of the deed—1773—the sea had gradually encroached upon the land twelve or fifteen feet or more, and the high and low water-marks had advanced in the same degree. There was some evidence that the shore on the north and south (*quære*, east and west) had been formerly beacons out. The plaintiff contended the grant was confined to the shore as it existed at the time of the grant: the defendant that it conveyed the soil of the shore between high and low water-mark wherever those marks might be. To shew that there might be a moveable freehold Co. Litt. 4 B. was cited.

In delivering their opinions some of the learned judges seem to have treated it as a case of accretion, which it was not unless they meant of accretion by the waters of the sea to the land, or of the shore, by reason of it being shifted inland by the action of the waters. It was no doubt decided by analogy to the rule applicable in cases of accretion, but it really was a case of encroachment as distinguished from accretion or alluvial deposit. Bayley, J., as reported in *Scatton v. Brown*, holding that there might be a moveable freehold, said: "The question was, whether there may be a certain quantity of land shifting in situation and resting in the same person at different times. That must be the case if land fronting the sea or a river, where from time to time the sea or river encroaches or retires, if the sea leaves a parcel of land the piece left belongs to the person to whom the shore then belongs. The land between high and low water-mark originally belonged to the Crown, and can only vest in a subject or the grantee of the Crown. The Crown by a grant of the sea-shore would convey, not that which at the time of the grant is between the high and low water-marks, but that which from time to time shall be between these two termini. Where the grantee has a freehold in that which the Crown

grants, his freehold shifts as the sea recedes or encroaches. Then what was the object of the parties to the deed of 1773? To grant the land within certain limits : those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low water-marks. I think that those words must be construed with reference to the rule of the law upon the subject of accretion, and that as the high and low water-marks shift, the property conveyed by the deed also shifts, and was of opinion that the plaintiff was not entitled to recover in respect of the stones taken between high and low water-marks at the time when, &c."

As reported in 6 D. & R. 547 he said: "The Crown by such a grant—i. e., of the land between high and low water-marks—must of necessity convey, not that which at any one time constituted the space between these termini, but that which might from time to time hereafter constitute that space; and the grantee of a freehold so granted would possess a freehold moveable, varying and shifting according as the sea encroached upon or receded from the land. Here the object of the parties to the deed was to grant the land within certain boundaries, those on the east and west being ascertained and stationary, and those on the north and south being moveable and to be ascertained by the high and low water-marks from time to time. Such a grant must be considered with reference to the common law upon the subject of accretion, and the property conveyed by it must be held to shift as the high and low water-marks themselves shift."

Holroyd, J., in 4 B. & C. 502 is reported as saying: "The grantor conveyed the whole of his share between particular boundaries; he had therefore no part of it remaining in him, and the grantee stood in his situation. Then the accretion follows as an accessory to the principal. The change being gradual it became part of the shore, and belongs to the person who has the shore at the time when the accretion takes place."

In 6 D. & R. 549, as saying: "Then if the soil has passed the grantee must, as a matter of course, stand in the same situation with respect to the soil as the grantee would have done if he had never executed the deed. The grantor con-

veyed all the shore within particular boundaries; nothing therefore remained in him; the grantee stood in his situation; and the accretion followed as an accessory to the principal: the change being gradual the accretion became part of the shore, and must of course belong to him who has the shore when the accretion takes place."

Littledale, J., in *Scratton v. Brown* (4 B. & C. 504), after saying that the only subject of inquiry was whether the place in question, &c., was called by either of the names, Middleton Hall Shores and Sea Grounds, for the subject matter of the grant cannot be affected by the subsequent part of the deed, which has nothing to do with the grant, but is merely matter of description, &c., and that subsequent words of affirmation, though wrong in points of description, do not effect the previous grant, &c., (see the language of the grant in 4 B. & C. 487 and 6 D. & R. 538), said: "The only remaining question is, whether the accretion which has taken place passes by that grant; and he thought it quite clear (referring to *Rex v. Lord Yarborough* and *Hale's de Jure Maris*) that the increase being imperceptible, continued to pass as incident to that which belonged to the grantee, &c., and that the deed was sufficient to pass the accretion which had taken place." In 6 D. & R. 551, after using language substantially the same in relation to subsequent words of affirmation or description, after previous general words of grant, said: "Then as the soil between high and low water-mark is granted, it is granted subject to the variations made in it by corresponding variations in the tide. It is the grant of a shifting soil; and the accretion being imperceptible, it is clear, &c., that that continued to pass as part of the soil which had vested in the grantee."

I have been thus particular making extracts from this case because it seems to me much in point, and because the language of the judges may seem to imply that if accretion instead of encroachment had taken place after the grant of the shore, the accretion would have belonged to the grantee of the shore, and not to the lord of the manor; whereas I do not think such was the meaning of the learned judges. I think they meant to hold that the shore might advance or recede from its original position, but that the grantee would only be

entitled under his grant to hold the shore for the time being. This I think is clearly expressed by Bayley, J.; and if not so, it would not be a moveable freehold, as all the judges held it to be. When, Holroyd, J., said of the accretion, that it became part of the shore, he did not mean part of that part that had been granted as added to the grant, but as part of the shore, speaking of the whole line of shore as affected by accretion or encroachment—the gradual change became part of the shore; that is, worked a gradual change in that part of the shore where the accretion or encroachment took place: what had previously been shore ceased to be so, and the new shore belonged to him who had the shore when it became thus gradually shifted.

When Littledale, J., speaks of the increase passing as incident to that which belonged to the grantee, he must have meant as incident to the grant of the shore, and which grant conveyed the shore for the time being: he says it was the grant of a shifting soil. And when he said it was clear the accretion being imperceptible continued to pass, &c., he meant that the accretion, so far as instrumental in forming the shore, passed; not that the shore as originally covered by and embraced in the grant remained stationary, subject to extension inland or seaward, according to the encroachment or displacement of the sea. The trifling extent of the encroachment, though it extended the shore inland, did not seemingly form an entirely new shore, and in that sense become part of the original shore landwards, as part of it had been obliterated seawards; the central part all the time remaining and continuing to form part of the shore. The fact of the change of the shore having been caused not by accretion but encroachment, may also have had some influence on the language used by the judges.

The inference I draw from this case is, that the grantee of the shore or space between high and low water-marks would not gain land by accretion, but that he would always hold the shore for the time being bounded between high and low water-marks, while the accretion if any would belong to the owner of the main land as *terra firma*, who (and not the owner of the shore) was liable to loss by encroachment of the waters, as that case proved.

The relative rights of the Crown, the public, and private

individuals or grantees to the sea-shore, was very fully discussed in *Blundell v. Catterall* (5 B. & A. 268). In that case the lord of the manor was owner of the shore. I more particularly mention it owing to what is said of the *ripa*, or banks of ports, rivers, &c., and the shores of the sea, &c.—*Ib.* 286, 292, 294, 303.

At page 308 Bayley, J., referring to passages quoted from Hale's *de Jure Maris*, 22, 36, and Bracton, said the word "*ripa*" here applies to rivers and ports, and probably also to the land above the high water-mark. See also what he says at p. 310; also Abbott, C. J., at p. 312, 314; also *Smith v. Her Majesty's Officers of State for Scotland* (13 Jurist 713, 717). As to the presumption of ownership being in the adjoining proprietors, see *Lowe v. Govett* (3 B. & Ad. 862), *The Duke of Beaufort v. The Mayor of Swansea* (3 Ex. R. 413), *Calmadie v. Rowe* (6 C. B. 861).

In the case of *Roddy v. Moffatt* (Q. B. U. C. 2 V.) a question arose touching the meaning of government grants of land in Newark or Niagara, described (in 1798-99, 1803) as commencing eight chains from lake Ontario along the bank of the three-mile pond, then along the shore of the lake; and commencing three chains from lake Ontario along the edge of the water of the four-mile pond, then to lake Ontario, then along the shore, &c.; and commencing at the water's edge on the shore of lake Ontario, afterwards returning to the waters of lake Ontario, and then along the water's edge of said lake, &c.

I then said, the patent bounds the *locus in quo* on the north by lake Ontario, and along the shore; and though I think it may well be construed as extending only to high water-mark, it is susceptible of extension to low water-mark or the water's edge; and there are cogent reasons in favor of the latter. The English books, speaking of tide waters, say the shore is the space between the ordinary high and low water-mark occasioned by the flux and re-flux of the sea. The grant of the land in question assumes that there is a shore on the lake, and it forms very much a matter of fact what constitutes it. I consider high water-mark to be the defined line, if any, marking the termination of the ordinary sea-wash, and that the shore commences there.

It is a question of fact upon the spot whether there be a precipitous bank against the waters, or a sloping beach on which the swell rolls to a line plainly marked on the sand; and if the latter, I consider it the high water-mark. Then, referring to the language of Abbott, C. J., in *Rex v. Lord Yarborough* (3 B. C. 106), and the statute of 7 James, ch. 18, which spoke of the shore as beginning at the full sea mark, I said: "If the grant extends beyond high water-mark and always to the water's edge, then I think there is a public easement in the intervening shore for all persons to fish there, the public confining themselves however to the shore or space below high water-mark. If there be no space entitled to be so designated, the public enjoyed no right to fish on the land covered by the grant, &c."

After expressing such views I met with Bell's *Principles of the Laws of Scotland*, in which, at page 169, section 643, it is said expressly that lands bounded by the sea or sea-shore are alike, and both extend to low water-mark; that is, include the shore, subject to the public easement for purposes of navigation and to fish.—See however *Smith v. Her Majesty's Officers of State for Scotland* (13 Ju. 713, ante page 521). I may also refer to the case of *Clark v. Bonnycastle* in the U. C. Q. B. R., and the case of the *Queen v. Myers* in 3 U. C. C. P. R. 305, in which last case many of the authorities bearing upon aquatic rights are collected.

In *Parker v. Elliott* (1 U. C. C. P. R. 470) the same subject was much discussed. There the government grant commenced within one chain of the south-east angle of lot No. 25 on the bank of lake Ontario, then inland, then to lake Ontario, then along the bank of the lake to the place of beginning. At page 478 I remarked that the words "the bank of the lake" and "to the lake" were evidently treated as of equivalent import, and that from the lake a line might be run westerly along the bank. At page 481 I expressed my impression from the authorities cited at page 480, that "to the lake," or "the bank of the lake," meant high water-mark, and that consequently the southern boundary of the grant was the high water-mark or bank of the lake. The application of such language, if correctly adopted to the present case, will be

hereafter apparent.—*Padwick v. Knight* (7 Ex. R. 857; S. C. 16 Eng. R. 573).

Then, turning to the facts in evidence in this case, it appears to me the part of the land mentioned and described in the deeds from Ross to Kittridge, 11th of April, 1812; from Kittridge to Perry, 23rd of April, 1815, and Perry to Buck, 11th of January, 1819, has been since divided by a street called First-street, running from lake Ontario back, parallel to the allowance for road or side-road between lots Nos. 17 and 16 in the broken front concession called B., which road allowance is now called Division-street, and bounds the tract in those deeds mentioned on the east; but that the land now in question lies westwardly of First-street, and is partly in front of that portion of the tract mentioned in the above deeds, which is to the west of First-street, and partly still more west—opposite lands obtained by Buck from Monjean.

There was at the first trial no deed from any one to Monjean in evidence, to shew when, how, or by what description he acquired title to any of the lot No. 17. It was produced at the last trial; and the deed from Monjean to Buck, dated the 16th of March, 1819, from the place of beginning, wherever that was, runs specific distances, but whether to the water's edge or in front was not and is not clearly explained. Roach the surveyor, who prepared a large plan produced at the trial, said the westerly line specified in the deed to Perry, and from Monjean to Buck, according to the distance specified, would run into the lake, as it was at that time: not saying what time, but apparently meaning at the time those deeds were made.

The deeds under which Kittridge, Buck and Perry held described the tract as being "all that certain parcel or tract of land lying and being situate in the township of Hamilton, containing by admeasurement two acres and one rood, be the same more or less, being composed of part of lot No. 17 in the broken front adjoining lake Ontario, which said parcel or tract of land is butted or bounded, or may be otherwise known as follows: beginning, &c.—See description, ante page 512,

The tract conveyed by Buck to Throop on the 25th of February, 1828, is supposed to run on the west side of First

street, from other lands belonging to Throop, five chains, more or less, to the high water-mark; and then south seventy-four degrees west two chains fifteen links, to the land owned formerly by Monjean, &c., reserving the south-west corner of that part of the described lot of land which was fenced in,—a piece of ground three rods in front and six rods in depth,—together with free access in front of the said three rods to the lake for all boats, vessels and persons; and on the plan above mentioned a tract of three rods by six rods is laid down, which is said to shew the relative position of the tract thus mentioned in the deed from Buck to Throop.

Now so far as it constituted a matter of fact for the jury, they must be taken to have determined that Buck owned, or that Throop after 1828 acquired by accretion, the right to the land for which this action is brought; and the legal question is, whether there was evidence to go to them sufficient to warrant such finding. As respects that part of the tract in dispute which lies in front of the tract conveyed by Perry to Buck by the deed of the 11th of January, 1819, it depended upon the deed from Ross to Kittridge; for each of the three deeds, dated respectively the 11th of April, 1812, the 23rd of April, 1816, and the 11th of January, 1819, described the same tract in similar terms.

The question of construction on the face of them is, whether the description extends to the water's edge to low water-mark, or only to high water-mark, or only to the bank, as distinguishable from high water-mark. This is to be determined by the boundaries, without which the tract would be uncertain. Then is it described as adjoining lake Ontario, or is it only the broken front that is so described? The tract is described as being in the township of Hamilton, as containing two acres and one rood, more or less, as being part of lot No. 17 in the broken front adjoining lake Ontario: had it commenced, "all that parcel of land, &c., adjoining lake Ontario," there could have been no doubt.

It may be said there may be several broken fronts, and nothing to designate what is meant by the broken front in this deed, except that it adjoins lake Ontario, no name or concession being given to such broken front. Still it calls it

the broken front, not a broken, or one of the broken fronts ; and what the broken front in fact was, containing a lot No. 17 within it, was a matter of fact to be determined by evidence, and it could not require to be described as adjoining lake Ontario to determine what was meant by the term broken front. Again : it may be said that lot No. 17 might be in a part of the broken front which did not adjoin lake Ontario ; wherefore, it cannot be intended that the lot is spoken of as adjoining the lake, nor could it be necessary. The answer seems to be, that it is also a matter of fact, and that the lot would be presumed, until the contrary was shewn, to front, as the broken front which contained it did ; and that if the one adjoined the lake, so did the other.

Then it is said, it cannot at all events be intended that the part to be conveyed adjoined the lake. It appears to me it should be so intended as being the meaning of the deed according to the description given. The statute shews that the township of Hamilton, the broken front lot No. 17, and the town of Cobourg adjoin lake Ontario and go to the water's edge. The deed imports that the broken front, although not called a concession, was a larger tract than lot No. 17, and that lot No. 17 was a larger tract than the piece conveyed. If the government patent be looked to, it shews that lot No. 17 in the broken front of the township of Hamilton was a tract of 240 acres, described as commencing in front upon lake Ontario at the south-east angle of the lot ; then running back on the east side 120 chains ; then crossing twenty chains, more or less ; then returning on the west side to lake Ontario ; then along the water's edge to the place of beginning, shewing that upon lake Ontario, at the south-east angle of the lot, and to lake Ontario mean the water's edge of lake Ontario. We see then that the tract conveyed is part of the township of Hamilton, part in the broken front and part in lot No. 17 described as being in said township, containing so much land, being part of lot No. 17 in the broken front adjoining lake Ontario. I doubt not the word "adjoining" may be construed with broken front, or with lot No. 17, or with both ; but I think it means to refer to and ought to be construed with the tract conveyed, as being part

of lot No. 17—thus; being in Hamilton, containing so many acres, being part of lot No. 17 in broken front and adjoining lake Ontario, all properly construed together. The broken front is mentioned to designate the concession or tract of which lot No. 17 composed a part; No. 17 to indicate the lot of which the two acres one rood formed a part, and which I think is described as being, &c., containing, &c., and adjoining lake Ontario.

Had the description stopped at the words “adjoining lake Ontario,” without anything more special, afterwards added, the deed would not have been void for uncertainty, but the grantee would have been entitled to a strip of land along the whole front of lot No. 17 adjoining the lake sufficient in depth to make two acres and one rood. If so, it seems that the words “adjoining to lake Ontario” constitute part of the description of the tract granted.

The question is, what is the subject matter of the grant, or what was granted.

But without more, the tract would still be uncertain unless the whole front of the lot was assumed, and specific bounds are given; the first shews the intention quite clearly: it says, “beginning at the bank of lake Ontario (not at the top of or upon the bank) at the south-east angle of the said broken front, meaning evidently not the south-east angle of the broken front concession, but of the lot No. 17; and if so, it meant beginning at the water’s edge of the lake, or the front of the bank, or that part of it in contact with the water’s edge. It then gives the distance inland, and returns on the west side to the bank of lake Ontario, and thence along said bank the several courses thereof to the place of beginning. It is said this bank cannot be intended to be or to mean the same thing as the water’s edge, but I do not see what else can be intended, than that the tract conveyed beginning at the south-east angle of the lot No. 17, which is at the water’s edge, is meant to be part of the front of the lot, and therefore bounded in front as the lot No. 17 is bounded, though the bank and not the water’s edge is mentioned. The description shews that at the place of beginning the bank and south-east angle of the lot were supposed to coincide; and a line traced

from thence westerly following the bank would indicate the same line as the deed calls for in the reverse direction—*Roberts v. Carr* (1 Taunton, 495), *Lowe v. Govett* (3 B. & Ad. 863), *The Duke of Beaufort v. The Mayor of Swansea* (3 Ex. R. 413), *Calmadie v. Rowe* (6 C. B. 861).

I do not lay stress upon what is found in the English books relative to the presumption of ownership down to ordinary high water-mark or to the shore, in the proprietor of the adjoining estate or riparian proprietors. But, independent of this technical or grammatical construction, it appears to me that when the evidence is looked to, the same result follows, whether the bank or the water's edge be adopted as the front boundary. If the water's edge be the true construction, there is an end of the question; if not, the bank must be something different and not extending so far out. If so, I think it still forms a question whether such bank was not the natural boundary of the water, and whether anything existed in fact beyond or south of the bank that formed part of lot No. 17, and was not the shore, but a vacant tract still remaining in Ross, and situate lying and being between such bank and the shore or high water-mark. Whether there did remain any such tract capable of being extended by accretion as the shore receded from the bank, was also a question of fact; and on the evidence I think it was quite open to the jury to find that the bank mentioned and referred to in the deed to *Kittridge, &c.*, bounded the lake on the land side, and that between such bank and the water's edge the space not constantly covered by water (if any) formed the shore of the lake, and is properly so designated; and if so, I think such shore is liable to the same incidents as the sea-shore in England.

The evidence warrants the inference that Ross conveyed all the front part of lot No. 17, at all events, except the shore; and if so, he continued to hold the shore only; and if so, it presents a case the reverse of *Scratton v. Brown*, inasmuch as the shore has receded instead of encroaching upon the mainland. Regarded in this light, I look upon the accretion as gained to the mainland or bank bordering the lake in the nature of an appurtenance, on the principle that he who is liable to sustain loss by encroachment should

acquire ground by accretion. Had the lake encroached upon the bank, as it is said to have done further west, where the township of Hope joins Hamilton, instead of receding or being excluded by accretion, the grantee of Ross would certainly have sustained the loss, and the shore, though shifted, would still have belonged to him, according to Scrutton and Brown; and if so, it follows that the owner of the bank or the riparian proprietors, and not the owners of the shore, are entitled to accretion formed since the deed of 1812. That the accretion has been to the bank mentioned, and that the high water-mark, if not the water's edge properly so called, did extend to it, are proved beyond question by the fact, that the bank has since been buried or obliterated by the action of the water, which could not have happened by the operation of natural causes, such as accretion, if the water had not washed up to and over it.

As the accretion formed, the bank became surmounted by the accumulations which formed such accretion; and the bank afterwards existing, if any, must have been advanced seaward; and as being the termination of the mainland or boundary of the lakeshore the owner up to and including the bank would be entitled to follow the progress of such bank as by accretion it advanced, just as the owners of the shore retained their legal rights therein though shifted in position. I do not think the accretion is to be attached to the shore, so as to convert what was shore into mainland or *terra firma*, as it is expressed, and at the same time to extend the shore itself, but that the accretion belongs to the owner of the lands adjoining the shore as riparian proprietor; and so far as such words can be material, the deeds convey the tract, with all hereditaments and appurtenances thereto belonging or in anywise appertaining.

There is force in these words, for some of the cases speak of accretion as becoming appurtenant, though not so technically; but when there is added thereto the words "belonging or in any way appertaining," they seem comprehensive enough to relate to accessorial acquisitions of this kind as intended, though not susceptible of being granted prospectively.

It may be said that if the bank was high the water might

rise against it and entirely submerge the shore without encroaching on the mainland, in which event the owner of the shore would lose his right in one place without gaining an equivalent in another.

The answer that occurs to me is, that it is not this case. If the bank was high, and had remained unaltered without being encroached upon by the waters, though they rose partly against it, or without accretion from alluvial deposit, no conflict of rights could arise, as the owner of the shore could not descend to the water, nor could he have any right of accretion consistently with which the owner of the shore might be deprived of it until the waters subsided, when (if they afterwards receded) his estate would return in point of possession and enjoyment, as it had all the time subsisted in point of right.

Moreover, the owner of the bank might, by fencing against the lake, prevent the waters encroaching upon or wearing away the mainland, and thereby preserve his original front undiminished. So the owner of the shore might by the removal of deposit prevent accretion, and preserve the shore in its original situation and condition. But as the owner of the shore could not invade the bank or higher land without becoming a trespasser, so the owner of the bank could not enter upon or change the shore without trespassing upon the close or possession of the party entitled to the shore, if held separately and apart from the bank or mainland.

If then the owner of the shore, who alone could legally keep it clear of deposit, failed to do so, but permitted such deposit to cover the shore and attach itself by accretion to the bank and shore respectively as the accretion prevailed and excluded the waters, I infer that the riparian proprietor or owner of and to the bank would be entitled to the land thus formed by accretion, and to treat the bank and the shore for the time being as his proper boundary or limit; if not, his land would cease to be bounded by the shore, and the bank would cease to exist by reason of the accretion; and such accretion, though it covered the bank and removed the shore in fact, would be held to convert what was originally the shore, and the shore only, into an extended tract of firm land with the shore

beyond it, and thus to confer a tract of land between what was the bank and the shore for the time being upon the owner of the shore in preference to the owner of the bank or mainland, to which such accretion in point of fact had attached itself, which would be contrary to what I take to be the established rule on the subject of accretion.

If it could be laid down as a rule that when in the grant of a small tract of land any specific, natural or artificial boundary, as a bank or fence, is called for, the land so bounded could not be extended by accretion though it adjoined the shore, it might be an answer to this action. And what is said by Lord Campbell in *Smith v. Her Majesty's Officers, &c.* (13 Jurist, 718) favors such a view; but I have not been able to satisfy myself that the doctrine of accretion does not apply in such cases, when, as in this case, the boundary called for (when natural or artificial) adjoins the shore of the waters, through the action of which the accretion takes place. Here it is necessary to dig down through the surface or new soil to find where the old and new soil united; and yet, though buried by the sand thrown up or deposited upon it by the action of the waters, it is said there is no accretion to the bank.

Then, as to the effect of Monjean and Buck's deeds upon the tract lying west of what was contained in the deeds from Ross to Kittridge, &c.: It is under Buck's deed that Throop derived title to all that he owned of both tracts on lot No. 17 in front, so far as the evidence shews; and it distinctly makes the high water-mark the boundary of the south-east angle of the tract thereby conveyed. From that point a definite course and distance are given to lands formerly of Monjean; but whether a strict adherence to such course would make a line along or within or outside of the high water-mark, the evidence does not clearly shew. That it was intended or expected to follow the high water-mark, or to extend to the lakeshore as Monjean's grant did, is shewn by the reservation of access to the lake for all vessels and persons in boats, of the three rods in front by six rods in depth that were fenced in or excepted from the conveyance.

This reservation shews that the parcel conveyed would have included the piece fenced in of three rods wide by six rods,

and that free access in front thereof to the lake would or might be intercepted, if not reserved. Now if the bank of the lake in one set of deeds and the shore of the lake or high water-mark in the others are identical, the high water-mark or shore was the boundary of the grant to Throop along the front thereof, which was a matter of fact for the jury in applying the description contained in the deed to the ground.

I have expressed my opinion that the shore of the lake or the waters of the lake (if no space or tract coming within the definition of shore intervened) must have been adjacent to or immediately adjoining the tract granted by Buck to Throop; and that if so, although the shore might afterwards recede and the right of the owner thereof recede with it, still the accretion would unite with and belong to the front as bounded by high water-mark, which mark for the time being would be its proper front or the boundary of the mainland, whether advanced by accretion or curtailed by encroachment.

It follows, therefore, that in either point of view no land was left, which in my opinion could sustain a claim to accretion adversely to Buck or Throop and those holding under them. As originally granted, the Crown had access to the water along the whole front of lot No. 17; so would the owner of land adjoining the lake or entitled to go to high water-mark; and if from such front the lake was excluded by accretion, the front should expand accordingly, so as always to adjoin the lake or high water-mark, which it could not do if an intervening strip was to be held to exist and to gain by the accretion to the exclusion of the owner whose land originally adjoined the lake, or was bounded by high water-mark. It was not contended that the increase belonged to the Crown, and not to the owner of the front part of lot No. 17, and it is not a point to be raised incidentally or disposed of without argument.

I have not overlooked the evidence as to possession, and with reference to the case reported in 13 Jurist 713, ante, there is evidence that Throop actually occupied by fencing below the bank spoken of after he acquired both in 1828; and if the subsequent increase by accretion accrued to him *de die in diem* as owner of the land to which it became attached, there is not

proof that he or those claiming under him became entitled to the land in question by accretion as having been formed and possessed more than twenty years before action brought, if that would be material, or if possession did not by intendment of law extend day by day as the front became gradually extended by the accretion formed.

The decisions in the courts in the United States upon questions of this kind have not been consistent; but, so far as I can judge from what is said in 3 Kent's Com. 428 and Notes, sixth Ed.; Angell on Water-courses, 43, 50, fourth Ed., I do not think those emanating from courts of the highest repute militate against the views I have above, with the utmost diffidence, expressed.

MCLEAN, J.—This case was first tried before me at Cobourg, but the facts not being very clearly elicited, and the verdict being in favor of the plaintiff, a new trial was granted with a view of obtaining fuller information on various points of considerable importance in the case.

It was tried again before *Mr. Justice Burns* at the last spring assizes, and a verdict was again rendered for the plaintiff, and in Easter term a rule was obtained calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, or why a verdict should not be entered for the defendants, or a distributive verdict, pursuant to leave reserved at the trial.

On the last trial some of the witnesses examined on the former occasion were examined, and a good many others, chiefly with a view of proving the state of the front of the premises and the position of certain fences, and the extent of occupation by the late Benjamin Throop, under whom plaintiff claims. The testimony, as it appears to me, did not on either occasion shew such a possession as would establish a prescriptive right; on the contrary, it shews that the portion on which the accretion has taken place was never enclosed, and was used by all who desired to do so in landing or shipping goods, being considered up to the time of the erection of the piers as belonging to the Crown. The plaintiff must therefore depend on the strength of her title

derived through the patentee of the Crown to support her case, and it becomes important to inquire what that title is.

The patent from the Crown to Nathaniel Herriman bears date on the 29th January 1806, granting the whole of No. 17 in the broken front concession B., commencing on the water's edge on lake Ontario, and bounded in front by the water of the lake. I take it for granted that the patentee, or those who can make a clear title under him, must be entitled to hold at all times up to the water's edge of the lake, including any accretion which from any cause may have taken place. The plaintiff claims, under the deed to her late husband, to be entitled to hold to the water's edge. It is on this ground only that her action can be sustained. Then it becomes necessary to examine the specific boundaries contained in that deed, and in the deeds of those from whom his title was derived. It is in evidence that the patentee, Nathaniel Herriman, conveyed the broken front of lot No. 17 to Nathan Williams, and that Williams subsequently conveyed it to John Ross; the boundaries on the lake specified in these transfers being the same as in the patent. On the 11th April 1812 John Ross conveyed in fee to Timothy Kittridge two acres and one rood, part of No 17, broken front, *adjoining lake Ontario*, described as beginning at the *bank* of lake Ontario at the south-east angle of the said broken front; thence north sixteen degrees west two chains thirty-two links to the south-east angle of Elijah Buck's land; thence south seventy-four degrees west eighty-eight links; thence north sixteen degrees west five chains and sixty-eight links; thence south seventy-four degrees west one chain and fifty links; then south one degree and nine minutes east to the *bank* of lake Ontario; thence along the said *bank* the *several courses thereof* to the place of beginning. On the 23rd April 1816 Kittridge conveyed the same premises, by the same description, to Ebenezer Perry; on the 11th January 1819 Perry conveyed to Elijah Buck, according to the same description. It must be observed that the premises are described as part of No. 17 broken front, adjoining Lake Ontario, beginning at the *bank* of the lake at the south-east angle of the lot.

If the words, "adjoining lake Ontario" apply to the part of the lot conveyed, and not to the whole broken front, still these words must be controlled by the particular description which follows; in no part of the description is it stated that the boundaries extend to the water's edge, which would have formed quite as good a limit as the bank, and must at all times be more easily traceable, had it been intended that the lake should form the southern boundary.

The southern limit is carefully set down not to follow the water's edge from the south-west angle, but to follow *along the bank the several courses* thereof. Now, it is clearly shewn by the testimony of the plaintiff's and defendant's witnesses, that there was a bank between the lake and the premises conveyed of some feet in height, and that between that bank and the lake there was a sandy or gravelly beach of considerable width, over which the lake in rough weather used to wash up to the bank.

The description adopted satisfies my mind that the parties did not intend to include that beach in their deeds, probably, as was stated by some of the witnesses, because it was generally considered that it belonged to the Crown, and that the public were entitled to enjoy the use of it. Had such intention been entertained, there could have been no difficulty in making the lake the southern boundary, instead of the *bank and its several courses*. The description commences at that part of the *bank* which is at the *north-east angle* of the lot. It would have been just as easy and more natural, if the beach was intended to be included to have omitted all mention of the bank, and to have commenced at the north-east angle of the lot, or at the water's edge. These observations as to the southern boundary of this portion of the premises in dispute I have thought as well to introduce at this stage of the title, because, if Buck was only legally entitled to claim to the bank, he could not convey (and the plaintiff cannot claim under his deed) more than he was himself in law seized of.

On the 22nd March 1813 John Ross conveyed to James Williams the residue of the broken front, lot No. 17, reserving the parcel sold and conveyed by him to Kittridge, and

several other small parcels which had been disposed of by him. Then, on the 11th June 1816, James Williams conveyed to John Monjean $4\frac{1}{2}$ acres of the lot, commencing at the north-east angle of lot No. 2, belonging to Ebenezer Perry; then south eighty-two degrees west six chains twenty-five links; then north eight degrees east eight chains to lake Ontario; then north eighty-two degrees east, along the shore of the said lake, five chains twenty-five links; then on a certain course to the place of beginning. On the 16th November 1818 John Monjean conveyed to Elijah Buck two roods and twenty-one rods, part of the lot, bounded as follows: commencing at a certain mark made on a certain building belonging to Elijah Buck, part of which was on the premises then bargained and sold; then south ninety-six degrees west one chain, more or less, to the centre of the creek; then south five degrees thirty minutes east seven chains eighty links; then east seventy-one links; then north sixteen degrees west seven chains seventy-five links, to the place of beginning. Whether the distances specified in this deed would bring the front or southern limit of the ground conveyed to the water's edge does not very distinctly appear; but it is not material to inquire, because in the deed from Buck to Throop, to which I shall presently advert, and which includes this parcel of land and part of the ground which had been conveyed by Ross to Kittridge, the southern limit is *high-water mark*. Elijah Buck being thus possessed of the several parcels conveyed to him by Perry, and by Monjean, on the 22nd February 1828 conveyed to Benjamin Throop certain premises described by certain metes and bounds; the first parcel, stated to contain one acre of land, more or less, is not in any way connected with the premises in dispute. The second parcel specified in the deed is described as commencing where a post has been planted on the west side of First-street at the south-east corner of land owned by Benjamin Throop, whereon stand a potashery and distillery; then south nine degrees thirty minutes east five chains, more or less, to *high-water mark*; then south seventy-four degrees west two chains fifteen links, to the land formerly owned by John Monjean;

then north five degrees thirty minutes west five chains and thirty-one links, more or less, to the aforesaid land belonging to Benjamin Throop; then north eighty-four degrees east, to the place of beginning, reserving on the south-west corner of this lot of land, *which is fenced in*, a piece of ground three rods in front and six rods in depth, together with free access in front of the said three rods to the lake for all boats, vessels and persons. Under this deed the plaintiff, as devisee of her late husband, would be entitled to a width of two chains and fifteen links in front, extending to *high-water mark*, except in so far as the reservation of three rods on the south-west corner may interfere with it. The whole breadth of two chains and fifteen links would be 142 feet; and deducting three rods, or forty-nine feet and a half, it would be reduced to ninety-two feet and a half; and if now entitled to claim to the water's edge of the lake, the plaintiff will be entitled to that extent of the accretion which has taken place in front of the lands conveyed to her late husband. The whole breadth of the land conveyed by Monjean to Buck is only seventy-one links on its southern limit, equal to forty-seven feet and four inches; so that the reservation of three rods made by Buck in his deed to Throop will embrace the whole front of that parcel and a few feet of the tract adjoining on the east; and Buck has expressly reserved free access to the water in front of the three rods for all persons whatever, though why he should make such a reservation, if nothing in front of the three rods was granted by his deed, is not very apparent.

I have already stated that the southern limit of the land conveyed by Kittridge to Buck, being the *bank existing at the time the deed was made*, the parties claiming through Buck could not, in my opinion, go further south, even had Buck assumed a right to convey to the water's edge; but he has not done so; he in his deed makes the southern boundary *high-water mark*; and we are not left to conjecture what is meant by that term (which is rather inapplicable where there are no tides), for it is explained in the deed itself, and by the evidence taken on the trial. The reservation of three rods in front is made from a parcel of land which at the time of

the conveyance, on the 22nd of February, 1828, was *fenced in*, and the evidence shews where the fence on the south side was : that fence, according to the weight of evidence, was at the foot of the bank, where the rail fence spoken of by some of the witnesses had stood, and must have been put up (if not the old fence itself) by Mr. Throop on his southern boundary after he had arranged for the purchase and entered into possession. Mr. R. Throop in his testimony says, that his father came to Cobourg in the fall of 1822, and made an arrangement to purchase, but did not get his deed till 1828. He had, as appears by the deed, other land in 1828, on which his potashery and distillery were situated ; and according to the testimony of some of the witnesses, he occupied the field up to the fence on the bank as a yard for his pigs, which were kept in connection with the distillery. If, however, the limit intended had not been clearly pointed out by the reference in the deed to the fencing, I should still have felt obliged to attach a meaning to the words "high-water mark," which I think the parties themselves intended to attach to it; that is, the bank up to which in high water or gales of wind the waters of the lake usually reached,—a point which, according to the evidence, could easily be traced at the bank, north of the shingle or shore. It is not necessary to examine whether the defendants have or have not shewn a good title: the plaintiff must recover on the strength of her own title, and that being defective in my judgment, I am of opinion that the rule should be made absolute to enter a nonsuit.

RICHARDS, J.—I had hoped that on the new trial granted in this cause additional facts would have been elicited that would have enabled the court to come to a more satisfactory conclusion. In this I have been disappointed; and we must now decide the case on such facts as are before us, which I suppose are all that either party can bring out in the case.

As far as the evidence goes, it does not appear that there ever was a bank of any considerable height at the south-east angle of the lot No. 17 in the broken front concession. The inhabitants in that vicinity in the early settlement of the country used the lakeshore for a road, and drove up and

down without difficulty to and from the shore at or near the south-east angle of the lot.

The land on which the town of Cobourg now stands was formerly a swamp. When the water was high, and there were storms on the lake, the waves would overflow what was called "the bank" and stand in pools on the shore within it. Some of the witnesses also stated that at or about the date of the deed from Ross to Kittridge it was the general impression that the public had a right to use the lakeshore for the purposes of a road, &c.

When that deed was executed it is not at all probable there was any intention on the part of Ross, the grantor, to reserve for his own use any portion of the lot between the bank and the water. At that time it was no doubt considered valueless; and as we do not hear of any claim on his part, or on the part of those claiming under him, to the shore until recently, we may safely conclude it was not intended to be reserved, and that it was not so intended because it was then considered of little or no value.

By the terms of the deed referred to from Ross to Kittridge, I am not prepared to say that the "bank of lake Ontario" as therein mentioned may not mean, "the water's edge." The part of the description to which I now refer is as follows: "beginning at the bank of lake Ontario *at the south-east angle* of said broken front." The parties to this deed considered that the "bank of the lake and the south-east angle of the lot" (which was at the water's edge at that angle) were identical. If the words used will bear two constructions, that which is most against the grantor may be taken; and in that view the place of commencement may be the bank of lake Ontario; that is, the water's edge of the lake.

It seems to me there is great force in the argument of the learned Chief Justice as to the intention to convey a *part* "*adjoining lake Ontario*" of the broken front of the lot.

Then, supposing that under the deed from Ross to Kittridge land to the bank of lake Ontario passed, does the expression "the bank" then mean only to the top of the bank, or does it mean all the bank sloping to the water's edge of the lake? If the latter meaning be correct, then it confirms the view

already suggested, that in that deed *the bank of lake Ontario* and the water's edge of lake Ontario mean the same thing.

If however under that deed it must be considered that there is a space between the bank and the water's edge, what is it to be called? The witnesses say there were stones and shingle adjoining the bank, and sand between that and the water: that the distance from the bank to the water's edge at still water was on the average about a chain: some say more. There is also strong evidence to shew that the fences put on or near the bank were frequently washed away during storms. The evidence on that point has reference to the rail fence, which was on the *locus in quo* when Throop bought, and the board fence put up by him. The space then between the bank and the water's edge at still water is the shore; that is, the space between high and low-water mark. The witnesses speak of *the lakeshore or beach*, probably considering the terms convertible.

It is stated by one writer that "the beach of the ocean is generally speaking little more than the space between high and low-water mark; the beach of a lake, that between the water marks of the highest and lowest ordinary level of the lake." If Ross, by his deed to Kittridge, had made the shore of the lake the southern boundary of the lot, then I apprehend, on the authority of *Scrutton v. Brown* and *The King v. Lord Yarborough*, that the accretion would belong to the plaintiff, and Ross and those claiming under him could only hold the shore for the time being. Can the effect of the present deed be construed more favorably towards the grantor and those claiming under him than if the water's edge of the lake had been made the southern boundary of the tract, and Ross had reserved to himself and his heirs the shore or beach between the bank and the water's edge. In this view of the case the authorities just referred to are equally strong in favor of the plaintiff.

Let us now examine the actual process of accretion as it has taken place at the *locus in quo*. As I understand it, since the construction of the piers at Cobourg, by the action of the water the sand has been thrown against and over the bank as it was in 1812, so that it has been quite obliterated,

and what has become a new bank and a new shore has since been formed. It is very evident that the space between the bank as it was in 1812 and when the piers were constructed and the water's edge must be considered *the shore*,—the water itself having cast the sand and deposited it against the bank since that time. Then, to what has the accretion been? It seems to me it must be the bank: it is not the shore—*quoad shore*—that has been increased, but the bank itself; so much so that the old bank has been covered up, and is now quite obliterated. The ancient rule as applied to the doctrine of accretion seems to have been that when it took place so slowly and imperceptibly or insensibly that it could not be known that the sea ever was there, then it belonged to the subject; the words in Sir Mathew Hale's treatise being so referred to by Abbot, C. J., in *The King v. Lord Yarborough*,—"that the alluvion belongs to the Crown unless the gain be so insensible that it cannot be by any means (or according to another passage), or by any limits or marks found that the sea was there." The maxim "*de minimis non curat lex*," was also held to apply when the accretion was thus gradual. In such a case the old bank or water's edge would become obliterated so imperceptibly that it could not be ascertained where it had been, and consequently the beach or shore for the time being would necessarily be taken to have been the original bank or shore.

The soil of the sea when covered by it belongs to the Crown. When the same soil becomes dry land, that it should continue to belong to the Crown seems a natural and reasonable proposition; subject to this exception, that when the process of becoming land was so slow that it could not be traced, as already mentioned, it should belong to the owner of the adjoining soil as a riparian right. If this doctrine could be fully sustained, then whenever the accretion was so rapid that it could be easily traced, and its extent so great that there could be no difficulty in shewing, from the recollection of individuals or from permanent boundaries, where the sea-shore or bank from time to time had been, it would follow that the land thus formed would belong to the Crown. The case, however, of *The King v. Lord Yarborough* lays down some-

what different doctrine, and seems, with the later authorities, to settle the law in relation to accretion as follows: viz., when it takes place from day to day, and it is not perceptible as it proceeds at the end of a week or a month, although its extent can be readily ascertained afterwards, it nevertheless will be considered to be so imperceptible that it will belong to the owners of the adjoining close, and not to the Crown. The Court of Queen's Bench in Upper Canada in the case of *Doe McDonald v. The Cobourg Harbor Company* adhere to the same doctrine.

It seems to me if the rapid accretion which has taken place does not give the land to the Crown, although the land now dry was a few years since the land of the Crown covered with water, it can give it to the owners of the shore. The accretion being to the bank must follow the bank, and all that the owner of the shore can claim is *the shore*, wherever the shore for the time being may be.

As far as I can make out from the deeds and plan produced and given in evidence, the accretion claimed by the plaintiff in this action is that which is in front of that portion of the land conveyed by Buck to Throop, and embraced in the deed from Ross to Kittridge. On the whole, then, considering the intention of the parties, the description of the land in the deed and the language thereof, the situation of the premises at the time, their condition and mode of occupation since, the nature and extent of the accretion, and the authorities bearing on the point, I think the plaintiff is entitled to recover.

In coming to this conclusion, I cannot disguise from myself that the case is surrounded with difficulties, and that there are many good reasons to be urged against the view I have taken. The weight of argument and authority, and the justice of the case, seem to me to be in favor of the plaintiff.

All the cases have been so fully referred to in the elaborate judgment of the learned Chief Justice of this court, that it is not necessary to refer to them further here.

Per Cur.—Judgment for plaintiff.

**ROE BUCK, ALMOND BUCK AND GEORGE E. CASTLE V. THE
COBOURG AND PETERBORO' RAILWAY COMPANY.**

Accretion—Boundaries.

A parcel of land conveyed being described as so many chains, more or less, running to lake Ontario and thence along the lakeshore, &c., and a beach or strip of land having been formed by accretion between what was then the line and the edge of the lake as at present—*Held*, that the owner of the land was entitled to such strip of land to the water's edge, and was not limited to the boundary of the lake as it was when the above deed was made—the distance to the lake being more or less according to circumstances.

Writ issued on the 23rd of March, 1854. Ejectment for part of lot No. 17 in broken front concession B in the township of Hamilton, bounded west by Third-street, east by Second-street, south by the breakwater and breastwork of the Cobourg Harbor Company, and north by the market block of the town of Cobourg.

Defendants defend for part thus bounded:—commencing on the east side of Third-street, town of Cobourg, at a stake 404 feet north from the breastwork or breakwater of the harbor at the south-west corner of the fence of the premises of William Calcutt; then along the east side of said street south to the said breakwater; then easterly along the north side of the said breastwork, to a point where the west boundary of Second-street—if produced to the said breakwater—would intersect it; then northerly in a line with the western boundary of Second-street to the south-east corner of the fence of said Calcutt; then west along the south boundary of his premises to the place of beginning. They defend therefore for the tract lying south of Calcutt's fence and between Second and Third-streets.

At the first trial, before Mr. Justice Burns, the plaintiffs proved—

January 29, 1806. Patent to Nathaniel Herriman, 240 acres. (Description, Throop's case).

July 16, 1808. Nathaniel Herriman to Nathan Williams, 90 acres. (Description, Throop's case).

January 16, 1811. Nathan Williams to John Ross—no proof. (See Throop's case).

March 22, 1813. John Ross to James Williams, eighty-eight and a half acres. (See Throop's case).

June 11, 1816. James Williams to John Monjean, four acres and three-quarters. (See Throop's case).

April 9, 1817. James Williams to James Ross, one acre and a half, part of lot N. 17, &c., containing one acre and a half, commencing in rear of the concession on the allowance for road at the north-west angle of lot No. 3, belonging to Monjean; then south eighty-two degrees west seven rods; then south eight degrees east eight chains and a half, more or less, to lake Ontario; then north eighty-two degrees east along the shore seven rods; then north three degrees west eight and a half chains, to the place of beginning: registered the 18th of May, 1821. Memorial 804.

May 21, 1819. James Williams to Jeremiah Lapp, eighty-eight acres and a half (see Throop's case): registered the 19th of June, 1819. Memorial 681.

September 16, 1820. John Monjean to Francis Treaudeau, three acres, three roods thirteen perches; also, eight acres. (See Throop's case).

December 17, 1821. James Ross to E. Buck, one-quarter of an acre, part of lot No. 17 broken front concession B (upon the lake Ontario) of the said township of Hamilton, commencing in front of said concession on the shore of lake Ontario at the south-west angle of lot No. 3, belonging to John Monjean; then north three degrees west one chain fifty-six links and a half, to a stake or stone, more or less; then south eighty-two degrees west seven rods; then south eight degrees east one chain fifty-six links and a half to lake Ontario, more or less; then north eighty-two degrees east, along the lake-shore, to the place of beginning: registered the 23rd of September, 1833.

May 11, 1824. Francis Treaudeau to Francis A. LaRocque, among other tracts, part of lot No. 17 broken front concession, township of Hamilton, containing three acres, three roods and thirteen perches: commencing on the mainroad leading to York at the corner of the land now owned by Alexander Macdonell; then south eight degrees east seven chains ninety-four links, to lake Ontario; then north-easterly along the shore of lake Ontario three chains six links, to the land owned by Elijah Buck; then north one degree thirty minutes west eight chains twenty links, to the road; then

along the said road six chains and fifty links, to the place of beginning.

June 5th, 1824.—LaRocque to Bethune. Same tract as last, with others; three acres, three roods thirteen perches.

July 1, 1828.—Bethune to Buck. Town lot No. 8 in block B, containing one rood and fourteen perches, more or less, commencing on Second-street in said block B., at the north-east angle of said town lot No. 8; then south eleven degrees east along said street two chains forty-six links, more or less, to the south-east angle of said lot; then south eighty-two degrees west one chain thirty-seven links, more or less, to the south-east angle of town lot No. 10: then north eleven degrees west two chains fifty links, more or less, to the south-west angle of lot No. 7; then north eighty-three degrees east one chain thirty-seven links, to the place of beginning: registered the 17th of January, 1832.

June 13, 1842.—Elijah Buck to A. & R. Buck (plaintiffs), their heirs and assigns, among other lots of land, three town lots, lying and being situate near the lakeshore at Cobourg, containing about three acres of land, two of which lots being in front of the market block, and the other in front of the property of Benjamin Throop, deceased, to hold upon trust, &c.: registered the 21st of June, 1842. Two of these lots are said to be called Nos. 8 and 10. Almond Buck was E. Buck's heir at law.

For defendants—

December 17, 1844.—Angus Bethune to Covert, admitted that Angus was heir of James Bethune.

August 30, 1850.—LaRocque to Covert.

May 22, 1852.—Covert to Smith: lease for a year.

February 1853.—Buck v. Clench: judgment in trespass.

March 22, 1853.—Covert to defendants.

April 25, 1853.—Angus Bethune to Covert. •

April 30, 1853.—Lapp to A. Macdonald.

May 5, 1853.—Macdonald to Covert.

The two tracts in question are called lots Nos. 10 and 8, bounded on the east by Second-street and on the west by Third-street; No. 10 being west of No. 8, joining Third-street; and No. 8 east of No. 10, joining Second-street.

There was much evidence on the subject of possession and

of the nature of the bank and shore of lake Ontario in front between Second and Third-streets.

At the close of the plaintiffs' case it was objected—First. That the plaintiffs were not in possession; and the sale being made to the defendants by Covert ejectment will not lie, defendants being entitled to retain possession under their act of incorporation. Second. That the patent granted to the water's edge of lake Ontario, and that the deeds under which plaintiffs claim do not cover the land to the water's edge, but are bounded by the bank of the lake. Third. That the deed from Williams to Ross (9th of April, 1817) *does not go to the water's edge*, but only to lake Ontario and along the shore, and applies to the west part or lot No. 10. Fourth. That the east part (No. 8) was bought by a plan, on which the lot is called No. 8, and being described by specific metes and bounds in the deed from Bethune to Buck (1st July, 1828), can pass no more than lot No. 8 as on the plan and so bounded. Fifth. That as to the west part (lot No. 10), Williams's deed to Ross of the 9th of April, 1817, was not registered till the 28th of May, 1821, whereas Williams's deed to Lapp of the 21st of May, 1819, was registered on the 19th of June, 1819, and therefore superseded it; and the deed to Lapp did *convey to the water's edge* along the whole front of lot No. 17; wherefore the subsequent deeds—Lapp to Macdonald, 13th of April, 1853; Macdonald to Covert, 3rd of May, 1853; Covert to defendants, 22nd of March, 1853—conferred the better right and title to the tract in dispute, supported by the other deeds—Angus Bethune to Covert, of 25th of April, 1853; Larocque to Covert 13th of August, 1853. Memorials were by consent admitted as sufficient proof of deeds of conveyance: not produced.

At the close of the case the learned judge left it to the jury thus—First, as to the possession: That Williams's deed to Lapp, registered the 19th of June, 1819, being before the others, was of no consequence if Lapp had not been shewn ever to have been in possession: that Williams's deed to Ross and Ross's deed to Elijah Buck, embracing to lake Ontario and bounded by the shore, conferred title to the lake as it might encroach or recede, without reference to the top of the

bank: that the description was not limited to the top of the bank; and that "to the lake," and "bounded by the shore," meant more than the top of the bank. Then, were the plaintiffs and those from whom they claim in possession; that is, not in actual possession, but exercising acts of ownership over it as it increased, and the accretion going on; and if so, had it been interrupted in any other way or by any other person than by Covert, whose interruption had only been recent? If plaintiffs and those under whom they claim were in possession anterior to the possession of Covert, if he had any, then the title with possession conferred title to the accretion, defining possession as before stated. This as to No. 10 or the west part. As to No. 8 or the east part, that both parties claimed from Bethune. Then, referring to the deed from Larocque to Bethune, which commenced on lake Ontario and the lake boundary south and along the water's edge to the place of beginning, gave Bethune to the water's edge. But that, looking to the deed from Bethune to Buck, 1st of July, 1828, in connection with the surveyor's evidence, he thought it was not bounded by the water. That if the boundary was the natural boundary of the water, the owner would be entitled to the accretion or be liable to loss, but that when a fixed boundary was selected, he might be liable to loss, but not entitled to gain; and that as to this part the evidence did not prove possession or the exercise of acts of ownership over the *locus in quo*; and he thought the plaintiffs failed.

The jury found for the plaintiffs as to both pieces. No title was shewn in Castle, and the verdict should be restricted to the two Bucks or one of them.

In Easter Term, 18 Vic. (1855) *Dr. Connor*, Q. C., obtained a rule on plaintiffs to shew cause why the verdict should not be set aside and a nonsuit be entered pursuant to leave reserved, or a new trial be had, as being contrary to law and evidence and against the judge's charge.

The evidence went to establish more or less of a defined bank east of Third-street at the time Bethune sold the lots by his plan in 1824.

The suit of Buck and Clench was explained to have arisen

from Clench wishing to advance the rear of the Buck lot in proportion as the accretion had increased in front of its original front. Upon Bethune's plan of the 20th of April, 1824, the division lines between the lots east of Third-street to First-street are drawn down to the water's edge, whereas west of Third-street the space between the bank, as laid down thereon, and the water's edge, is called beach; and the side or division-lines of the lots are not continued or extended beyond the bank. The distance from the bank to the water's edge on the east side of Third-street is on this plan laid down as two chains thirty-two links; going east to Second-street the distance diminishes.

Vankoughnet, Q. C., shewed cause. He referred to the arguments upon the former case, and said there was no lot in front of No. 8; that the beach was reserved on Mr. Bethune's plan west of Third-street, but not in front of lot No. 8: that on the evidence it was for the jury, who found for plaintiffs.

Dr. Connor and *Eccles* supported the rule, and said:—There were two pieces in question; one in front of lot No. 10, and one in front of lot No. 8. The description in one goes to lake Ontario, which means to the bank, not to the water's edge, and the other has no such limit.

They called attention to a lease made by Covert in 1851, shewing that he exercised acts of ownership over the tract now claimed by plaintiffs: that on the plan lots Nos. 3 and 8 are identical in the descriptions: that the boundary lines of lot No. 10 are specific, and one crosses the front diagonally. The words "to the lake" are controlled or explained by the residue, which shews they only mean to the front of the lots on the lakeside: that the deed from Williams to Lapp, 21st of May, 1819, was registered before the deed from Williams to Ross, 9th of April, 1817—not registered till 1821—and therefore avoided it; after which Lapp conveyed to Macdonald, which gives the better title under the registry acts, the earlier deed being displaced. That as to possession and the statutes of limitation, reference was made to *Colton v. Wamanaker*, in Q. B. the preceding term: that Mr. Justice Burns's ruling as to lot No. 8 was incorrect; and the question

of disseizin was not left to the jury. They claimed all lot No. 8 by force of the registry acts; and if that failed defendants, they submitted the south boundary was limited by the front line as drawn upon Bethune's map.

MACAULAY, C. J.—After comparing the several deeds and memorials with the plans in evidence.—The case seems to depend upon the effect of two deeds, viz.: December 17, 1821, from James Ross to Elijah Buck, of the tract called lot No. 10,; July 1st, 1828, from Bethune to Buck, of lot No. 8. The first for one-quarter of an acre, commencing in front of the broken front concession B. at the south-west angle of lot No. 3, belonging to John Monjean; then north three degrees west one chain fifty-six links and a half, to a stake or stone, more or less; then south eighty-two degrees west seven rods; then south eight degrees east one chain fifty-six links and a half, to lake Ontario, more or less; then north eighty-two degrees east along the lakeshore to the place of beginning.

The second, one rood fourteen perches, more or less, commencing on Second-street at the north-east angle of the said town lot No. 8; then south eleven degrees east, along said street two chains forty-six links, more or less, to the south-east angle of said lot; then south eighty-two degrees west one chain and thirty-seven links, more or less, to the south-east angle of town lot No. 10; then north eleven degrees west two chains and fifty links, more or less, to the south-west angle of lot No. 7; then north eighty-three degrees east one chain and thirty-seven links, to the place of beginning.

It will be seen that the front of lot No. 10 is lake Ontario and along the lakeshore, and that the south-west angle of lot No. 8 corresponds with the south-east angle of lot No. 10—in other words, lake Ontario;—and although the easterly side-line of lot No. 8 does not call for the lake or lakeshore, still the south-west angle may aid the inquiry of what was the front of said lot No. 8. On the old plans it is laid down as bounded by the bank of the lake or the lakeshore, without anything to indicate or prove that another lot or that the front part of lot No. 17 in the broken concession B was to the south of it,

between the front of said lot No. 8 and the lake or water's edge of the lake. It appears to me the front part of lot No. 17 in the broken concession B. was laid out or disposed of in building or village lots, and that the lots Nos. 8 and 10 were composed of the front part of such lot No. 17 between Second and Third-streets. The description given of lot No. 10 seems to bring it within the decision of this court in the case of *Throop v. The Cobourg and Peterboro' Railway Company*; and I cannot say I see any sufficient ground for holding lot No. 8 (which is situated between No. 10 on the west and the Throop's tract on the east) otherwise bounded; but I think the front of both and the front of that part of lot No. 17 are identical. It follows that (assuming the owners of the front of lot No. 17 to be entitled to the accretion) such accretion in that part of it belongs to plaintiffs.

As to the conflict of registration: Although the deed from James Williams to Lapp of the 21st of May, 1819, was registered on the 19th of June, 1819, and therefore before the registration of the deed from James Williams to James Ross of the 9th of April, 1817—not registered till the 18th of May, 1821,—still there is no proof that Lapp ever was in possession, or that James Ross, and Buck after him, did not possess the one acre and a half conveyed to him in 1817 (from that time, or at all events from December, 1821, when James Ross conveyed to Elijah Buck) for upwards of twenty years before the deed from Lapp to Macdonell of the 30th of April, 1853.

The learned judge seems to have taken this view at the trial, and I perceive no good reason for entertaining any other.

McLEAN, J.—At the trial a title was established in the two first named defendants for two parcels of land, parts of lot No. 17 in the broken front concession B in the township of Hamilton, one of the parcels known as lot No. 10, according to a survey of part of the town of Cobourg, containing one-quarter of an acre of land, more or less: commencing in front of the concession on the shore of lake Ontario at the south-west angle of lot No. 3, belonging to one John Monjean; then north three degrees west one chain and fifty-six links and a half, to a stake

and stone, more or less; thence south eighty-two degrees west seven rods; thence south eight degrees east one chain and fifty-six links and a half, to the lake Ontario, be the distance more or less; then north eighty-two degrees east, along the lakeshore to the place of beginning. The other of the said parcels, one rood and fourteen perches, known as town lot No. 8 in block B in Cobourg, and being also part of lot No. 17 in the broken concession B in the township of Hamilton, commencing at the north-east angle of the said town lot No. 8 on Second-street; then south eleven degrees east along the said street two chains forty-six links, more or less, to the south-east angle of the said lot; thence south eighty-two degrees west one chain and thirty-seven links, more or less, to the *south-east angle of lot No. 10*; thence north eleven degrees west two chains and fifty links, more or less, to the south-west angle of town lot No. 7; thence north eighty-three degrees east one chain and thirty-seven links, to the place of beginning.

The deed for the first mentioned parcel is dated on the 17th of December, 1821, and for the latter on the 1st of July, 1828, from which time up to the 13th of June, 1842, the premises were in the occupation of Elijah Buck. On the last mentioned day they were conveyed by Elijah Buck to Almond Buck and Roe Buck, described as being situate and near the lakeshore at Cobourg and being in front of the market block.

These parcels of land, now known as lots Nos. 8 and 10, are adjoining: the former derived through James G. Bethune, the latter through James Ross by the late Elijah Buck, upwards of thirty-four years since. They have been held by him without question till he conveyed to his sons in June, 1842; and if any question could arise as to the prior registry of any of the deeds through which the several parties claim, it is now too late to urge it or to assert any claim on that account. There seems indeed to be no doubt of the title of the plaintiffs to the lots Nos. 8 and 10 as originally conveyed, but it is the land which has been formed in front of them by accretion from the lake, and which has become very valuable, that forms the subject of contention. If the lots were clearly

bounded on the south by the limit of the *bank* shewn by all the testimony to have originally existed there, then, as in the case of Throop against these same defendants, I must have come to the conclusion that such *bank* did not mean the water's edge, and that the beach in front between the bank and the water's edge, which was granted in the patent from the Crown, as well as any other portion of lot No. 17, belonged in fact to some one else, and consequently that the plaintiffs could not recover. But in this case the parcel conveyed by James Ross (No. 10) is described particularly as running to lake Ontario, and then along the lakeshore. Now it could scarcely be considered as extending to lake Ontario if it went no further than the bank, or any other limit which did not touch the water. The plain and obvious meaning of the parties was that the land conveyed should reach to the waters of the lake, covering as well the beach as any other description of soil within the boundaries granted. As to that lot, then, I think the owners' title is not limited to the precise piece contained in the *déed* to Elijah Buck, but that he is entitled to claim as a part of his lot all the land between the northern limit of his lot and the water's edge of the lake, the distance being more or less to lake Ontario. As to that portion, then, I think the plaintiffs are entitled to recover, and that the verdict cannot be disturbed.

As to the parcel known as lot No. 8, derived from James G. Bethune, there is nothing in the description itself unconnected with the description of lot No. 10 to shew that it was intended to run to the waters of the lake. It commences at the rear, at the north-east angle, on Second-street; thence the course is south eleven degrees east along that street two chains and forty-six links, more or less, to the south-east angle of the lot; and then south eighty-two degrees west one chain and thirty-seven links, *more or less, to the south-east angle of lot No 10*. The last mentioned angle of lot No. 10, I have already mentioned, is on the water's edge; and as Mr. Bethune was the owner to the water's edge of lot No. 8, and the eastern boundary specifies two chains and forty-six links, *more or less*, it is not unreasonable to assume that that boundary was intended to extend so far that a line from

thence to run south eighty-two degrees west would intersect the south-east angle of lot No. 10. A plan was put in alleged to have been used by Mr. Bethune in effecting sales, and it is contended that the lot No. 8 was sold according to that plan; but that plan is manifestly erroneous as to lot No. 10—the adjoining lot—and it may be equally so as to the intended boundary of lot No. 8, and cannot with such an error upon the face of it be allowed to controvert or explain the description in the deed. Besides which, there is no reference to any plan, nor is there anything to shew that the purchase was made of the lot as laid down on any plan.

I think therefore that it must be held that both lots extend to the water's edge, and that all the accretion which has taken place in front of them must be taken now to belong to these lots. From circumstances which have appeared on this and other trials of the same kind at Cobourg, the impression seems to have been generally entertained that the beach belonged to the Crown, and was reserved for common and general purposes. It is probably under this idea that the beach was so long allowed to be used by all who desired it without question, no exclusive claim being set up by anybody. There is not, however, anything in the testimony to shew that the owner for the time being of the lots in question could not at any time appropriate the beach in front of his lots and forming part of them to his own use, and enjoy them exclusively. Though the use was not denied to any one, there was no surrender or abandonment of the right which could operate in the slightest degree against a recovery at any time.

RICHARDS, J., concurred.

Rule absolute.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME,
DECIDED IN THE
COURT OF COMMON PLEAS.

ACCEPTANCE.

See DELIVERY.

ACCRETION.

This was an action of ejectment brought by the plaintiff against the defendants for the recovery of a portion of ground, known as lot No. 17 broken front concession B of the township of Hamilton, now in the town of Cobourg, adjoining lake Ontario. The defence was limited to a small portion bordering on the lake, which had been formed by the waves washing up sand, gravel and alluvial deposit, and thereby extending the bank inwards upon the lake. The deeds under which plaintiff claimed title conveyed "to the bank of lake Ontario, thence along the said bank the several courses thereof." It appeared in evidence that so much alluvial deposit had been washed upon the shore, and even upon the bank of the lake, that all traces of the former bank were now obliterated, and could only be discovered by digging through the surface or new soil.

The question was, whether the owner of the land described as adjoining the lake and extending to the bank had shewn a good title to the new soil which had thus attached itself to the bank of the lake. *Held*, that as the owner of the bank would, by the encroachment of the lake, be the loser (the owner of the shore, consisting of the part between high and low water-mark, always being able to claim the shore whether it shifted or not), so he should be entitled to the benefit of the extension of the bank seawards, upon the principle that whoever would sustain the injury should also be entitled to the benefit. McLean, J., dissentiente. *Throop v. The Cobourg and Peterboro' Railway Company*, 509.

AGREEMENT.

Construction of.—1. A. by agreement in writing, sealed, &c., in consideration of the rents, covenants and agreements on the part of B., to be paid, done and performed, did contract and agree with the said B. that he should and would on or before the 1st day of

October, upon request made to him in writing under the hand of B., grant and execute unto him a good and effectual lease, to be prepared or approved by the counsel of B. of all, &c., to hold for five years at, &c.; the said lease and counterpart thereof to contain certain covenants; and said A. thereby agreed to deliver to the said B. on the 1st of October staves, &c., at the above premises, at, &c., per thousand, for which said B. agreed to pay said A. therefor at, &c., and it was thereby agreed that there should be inserted in said lease a covenant on the part of the said A. that he would deliver to the said B. in each of the two succeeding years staves, &c.; and it was further agreed that B. should furnish securities for the due performance of the above agreement on or before the 20th day of July. *Held*, that a request in writing under the hand of B. for such lease, or the granting of such lease by A., is not a condition precedent to the right of B. to have the staves delivered at the time and place mentioned in the agreement, the covenants to grant the lease and to deliver the staves being separate and independent. *Leonard v. Wall*, 1.

Effect of, when not produced.—2. A written memorandum, under which plaintiff claims certain goods, not being produced at the trial, cannot in its absence be regarded as importing more in the plaintiff's favor than his own witnesses represent. *Canniff v. Bogart*, 341.

ANNUITY.

Apportionment of.—An annuity, payable annually during the annuitant's life cannot be apportioned so that the annuitant's administrator can receive a proportion of such annuity, the annuitant having died within the currency of the year. *Ausman Admor v. Montgomery*, 364.

APPEARANCE.

See ATTORNEY.

APPORTIONMENT.

See ANNUITY.

APPRENTICESHIP.

Contracts of apprenticeship for a less term than seven years, entered into before the passing of the statute 14 & 15 Vic. ch. 11 are not void, but voidable only. *Webster v. McBride*, 109.

APPROPRIATION.

See DELIVERY AND ACCEPTANCE.

ASSAULT AND BATTERY.

See TRESPASS.

ASSUMPSIT.

By agreement under seal the plaintiff in this case agreed with the defendant to manage, cultivate and improve the defendant's farm for one year, and do whatever work defendant should require during that period, in consideration of the sum of £95, payable at the expiration of the said term, plaintiff to have the use of the house on said farm during the term, pasture for two cows, and half an acre of land for a garden. The plaintiff served the defendant until within three weeks of the end of the term: then left the farm at the defendant's request, and upon defendant's promise if he would do so to pay or settle with him: defendant afterwards objected, and plaintiff sued in an action of assumpsit for work and labor generally. Defendant obtained a verdict. *Held*, that the plaintiff could not declare in assumpsit for work and labor generally, because the work was performed under a sealed contract. *Parnell v. Martin*, 473.

ATTORNEY.

Where a plaintiff, without serving a defendant, accepts the appearance of an unauthorised attorney, the court will set aside the proceedings as irregular, although it is not shewn that the attorney is insolvent. *Massey v. Rapelje*, 134.

BAIL.

Liability of.]—1. Defendants being bail of H. to the limits of the gaol of the then united counties of York, Ontario and Peel, the county of Ontario, in which the debtor H. resided, being separated by proclamation from the other two counties after the recognizance was entered into, and he having continued to reside in the county of Ontario after its separation from the other two. In an action of debt on the recognizance—*Held*, that defendants were liable as for a breach of the recognizance: that the limits of the gaol of the united counties of York, Ontario and Peel mean the limits for the time being, and that when Ontario was separated they became the limits of the gaol of the two remaining counties. *Ross et al. v. Farewell et al.*, 29.

Statute for relief of.]—2. Under the fifth section of the 18 Vic. ch. 69 defendants, in actions on bail bonds, where the breach has arisen by the separation of counties by the legislature, are entitled to have all proceedings stayed upon payment of the plaintiff's costs as between attorney and client. *Ross et al. v. Farewell*, 101.

BANKRUPTCY COMMISSION.

Debts proveable under.]—Debt on bond made by defendant and one W. as sureties for one Shaw conditioned that if said Shaw should not from time to time, &c., well and truly pay unto

the plaintiff each and every of ten promissory notes on the respective days on which the same became due and payable, according to the tenor and effect of the said promissory notes respectively; then, if defendant and said W., or either of them, should well and truly, absolutely and at all events pay or cause to be paid unto the plaintiff each and every of the said ten promissory notes on the respective days on which the same became payable, then, &c.; otherwise, &c., assigning breaches as to the last six notes. *Plea*, that Shaw did not pay the first and second of the said ten notes when the same became due and payable according to the tenor and effect thereof, and that thereupon the bond became forfeited; and that afterwards and while the said notes remained due and unpaid—to wit, on, &c.—said Shaw became bankrupt; and that afterwards, and while the said notes remained due and unpaid, and after the said writing obligatory had become forfeited, the defendant became bankrupt; and that said debt accrued due and was payable before the defendant became bankrupt. *Held*, that the bond being forfeited before the defendant's bankruptcy, therefore the penalty became a debt which the plaintiff might have applied to have retained in the hands of the defendant's assignee till the contingency happened, and then have proved; and that the defendant was discharged, and the plea consequently good. *Perrin v. Hamilton*, 57.

BILLS OF EXCHANGE.

Where a bill of exchange is drawn in Upper Canada, addressed to a person residing in Upper Canada and payable in England, ten per cent. upon the amount of such bill can be collected under the statute 13 Vic.

ch. 76. *Ross et al v. Winans et al.*, 185.

BROKER.

In an action against a broker, when a special employment is added to his ordinary duties—*Held*, after verdict for plaintiff, that when to the ordinary duties of a broker in a transaction some special employment and undertaking is superadded by express contract as laid in the declaration, the duty that arose resulted from such express contract, and not simply from the defendant's character of broker. *Deady v. Goodenough*, 163.

BY-LAW.

1. Case for wrongfully, negligently and carelessly digging and excavating streets in the city of Hamilton, adjoining plaintiff's close, and thereby injuring said close. *Plea*, not guilty, per statute. *Held*, that a by-law should have been passed by the corporation to sanction the act complained of. *Reid v. The Corporation of Hamilton*, 269.

2. The defendants, as a municipal corporation deriving their power under the statute 12 Vic. ch. 81, having by resolution authorised the raising and levelling of a street within their jurisdiction, which when done injuriously affected the plaintiff's property—*Held*, that a by-law should have been passed to sanction the act complained of. *Croft v. The Town Council of Peterboro'*, 141.

3. If a by-law be not void on the face of it without being quashed, all proceedings duly had under it while it remained in force may be justified under it. *Barclay v. The Municipality of Darlington*, 432.

CALLS.

See STOCKS.

CARRIER.

Liability of.]—Fifty barrels of oysters having been shipped at Oswego for Toronto per defendant's vessel the "Junius," and the vessel having been obliged by stress of weather to go to Kingston, from which latter port the goods were transhipped for Toronto, per the steamer "Oshawa," where they arrived in a damaged condition—*Held*, that the defendant was the carrier throughout; that is, from Oswego to Toronto via Kingston. *McConkey v. Gorrie*, 430.

COGNOVIT.

Impeachment of.]—In an action on the case to set aside a security under which plaintiff claims, or a portion of the sum confessed, the plaintiff in the confession may shew in support of it the circumstances that constituted the consideration for the acknowledgment, and that such confession was to operate as a continuing security, to cover future as well as past advances. *Douglas v. Mayer*, 377.

COLLATERAL SECURITY.

To a declaration containing five counts on five different bills of exchange defendant pleaded that, after the bill in the first count mentioned became payable, and while those in the other counts were running, it was agreed that the defendant should execute a mortgage of certain lands to secure payment of all the bills of exchange in the declaration mentioned, and that twelve months from the date of the said indenture should be given to the defendant for payment of the

same and all interest, damages, &c., by reason of the non-payment of the same; then sets out the indenture of mortgage, whereby, after reciting that the defendant W. had drawn bills of exchange drawn upon and accepted by the defendant P., and of which a portion was overdue and unpaid, which bills were endorsed by the defendant W. to the plaintiffs, that the defendant, being unable to provide funds to pay said bills, had agreed to make this security to M. (one of the plaintiffs) to secure them against all loss, damage, &c., which might accrue to them by reason of the non-payment of the said bills. In consideration of the premises and of 5s. defendant W. conveyed to M. (one of the plaintiffs) certain leasehold property, to hold for residue of term, &c., subject to a proviso that if said W. should well and truly retire the said bills, and pay or cause to be paid unto the said firm of the plaintiffs, or to the parties legally entitled to the same, all sums of money, damages, &c., by reason of the said bills and the non-payment thereof, or of any or either of them, or any part thereof, within twelve months from the date of the said indenture; and if he shall then well and truly indemnify and save harmless the said plaintiffs of and from all payments, damages and expenses by reason of the premises, then to be void, &c.; containing also a covenant by said defendant W. to perform the covenants in the said proviso, and also a proviso for said W. to retain possession of the premises until default. *Held*, that such mortgage was only to be taken as a collateral security for the due payment of the bills, and not as a substituted or independent security: that there was no merger, and that the right of the plaintiffs to sue upon the bills before the expiration of the twelve months was not restricted by such mortgage. *Ross et al. v. Winans et al.*, 185.

COMPENSATION.

See RAILWAY, 2.

CONSIDERATION.

1. A pre-existing debt is a good consideration in whole or in part for a promissory note or bill of exchange. *Gooderham v. Hutchison*, 241.

Partial failure of.—2. To a declaration on a promissory note the defendant pleaded as to £157 10s, part, &c., that the plaintiff represented that he was the owner of certain lands, and that he was the equitable owner of lot No. 14, &c., through one R., who had purchased it from the Crown on behalf of the plaintiff, and held the same as trustee for him; and that the plaintiff then falsely and fraudulently represented to defendant that he could procure said R. to make an assignment of his interest therein, and that the defendant was induced by the same representations to accept the plaintiff's offer to sell to him, the defendant, the same; whereupon the plaintiff by deed-poll conveyed all his right and interest in the said lands to the defendant: that defendant paid part down, and gave his two promissory notes for the balance, one of which is the one declared upon: that at the date of said deed-poll and notes the plaintiff had no right or interest in said lot No. 14; and that said R., although requested, refused to assign his interest in said lot to the defendant. *Held*, that such plea was no answer to the action, the contract being entire, and the failure of consideration not being definite as to this note. *Coulter v. Lee*, 201.

Failure of.—3. By agreement of the 18th of June, 1847, under seal, defendant agreed to sell to plaintiff the nett profits for two years from the date of the agreement out of certain shares in the Lake Huron and St. Mary's River Mining Company for £375. On the

25th of November, 1847, the Lake Huron and St. Mary's River Mining Company, through their president, directors and trustees, or other duly authorised officers, sold and assigned to the Montreal Mining Company certain tracts of land therein described, and all tools, engines, &c., for £33,250, to which sale defendant assented. *Held*, that the defendant having disposed of his stock, which represented his interest in the mines, before the arrival of the period at which he was to sell the profits to the plaintiff he placed it out of his power to fulfil his agreement, and so broke his contract; and that plaintiff became immediately entitled to sue for the breach thereof, upon the ground that the contract was at an end, and that the consideration had failed. *Sanders v. Baby*, 441.

CONSTRUCTION.

See AGREEMENT.—DEED.—PROMISSORY NOTE, 1.

CORPORATION.

See BY-LAW—MUNICIPALITY.—NOTICE OF ACTION.

Case for wrongfully, negligently and carelessly digging and excavating streets in the city of Hamilton, adjoining plaintiff's close, and thereby injuring said close, &c. *Plea*, not guilty, per statute. *Held*, that if the defendants are liable for the tortious acts in the declaration complained of, they are entitled to give the special matter in evidence under the general issue. *Reid v. The Corporation of Hamilton*, 269.

CROWN LANDS.

A purchaser from a crown lands

agent who holds a receipt for an instalment of the purchase money but who has not obtained a patent, may maintain trespass *qu. cl. fr.* against all strangers, though not against the Crown. *Glover v. Walker et al*, 478.

CUSTOMS.

High wines imported into this province are liable to a duty on each gallon according to the strength of proof by Sykes' hydrometer, and not according to the gallon by measurement. *Lane v. Jones*, 467.

DAMAGES.

Measure of.—1. Declaration states that plaintiff agreed with defendant to deliver to him on or before the 1st of August, at, &c., 500 cords of wood at 14s. per cord, to be paid for by defendant monthly, according to the quantity from month to month delivered: then avers delivery of 125 cords before the 1st of August; and although more than one month had elapsed after the making of said agreement, and although plaintiff was ready and willing to deliver the residue of said 500 cords, yet defendant would not pay the price for the quantity that had been delivered, nor accept the remainder, nor allow plaintiff to deliver the same. *Held*, that the measure of damages was the value of the quantity of wood delivered at the contract price, and also the difference of profit on the residue of the wood between the current selling price and the contract price. *Moore v. Logan*, 294.

2. Plaintiff, having contracted with Sykes & Co. to furnish railway ties, of which defendants had notice, afterwards entered into a sub-contract with defendants whereby defendants agreed to furnish plaintiff with a certain quantity of ties at eleven pence per tie.

In an action for breach of such sub-contract—*Held*, that the measure of damages was the difference in value upon each tie between what plaintiff was to pay defendants and what he was to receive from Sykes & Co. *Waters v. Bates*, 367.

DECLARATION.

An averment that the time for the giving of the security mentioned in the agreement had elapsed before the making and delivery of said agreement, and that plaintiff was ready and willing within a reasonable time after the making and delivery of said agreement to furnish the said security, and from thence hath been, &c., is good on general demurrer. *Leonard v. Wall*, 1.

DEED.

Construction of.] — A. by deed conveyed to B. all and singular those lands and premises, with the appurtenances, situate, lying and being at Point Iroquois Canal in the township of Matilda, being composed of the wharf, storehouses and appurtenances built on part of the east half of lot No. 24 in the 1st concession of the said township, south of said Point Iroquois Canal, commonly known as Carman's wharf. *Held*, that by such deed all the premises known as Carman's wharf would pass to B., although part of said wharf was in fact built in front of lot No. 23. *Carman v. Molson*, 124.

DELIVERY.

1. Defendants sold to plaintiffs, to be delivered at Port Hope on the 1st of June, 2000 bbls. of Otonabee and Peterboro' Mills flour, free on board; terms cash on delivery or on warehouse receipt. The flour was not

delivered on the 1st of June, but was deposited in Hackett's warehouse before and on the 6th of June; on which day a written order was given addressed to Hackett at Port Hope, requesting him to deliver to defendants at Port Hope 1000 bbls. flour Peterboro' and Otonabee Mills, free on board; across the face of which W. C. wrote, "Mr. Hackett will please deliver the within flour to R. A. G. or order, said R. A. G. being the broker in the transaction; and R.A.G. endorsed it in blank. On the 7th of June defendants wrote to R. A. G., enclosing the order for the flour, and requesting him to remit the funds by express next day. On the 11th of June, R. A. G. telegraphed to defendants, "Money goes to-morrow; was ready 1st of June." On the 12th of June Perry from Oswego telegraphed to Hackett, "Minerva leaves to day for the other one thousand barrels, account of Coleman" (one of the plaintiffs). On the same day R.A.G. from Toronto wrote defendants at Port Hope that he enclosed £2,125, being the last payment on the sale of the flour. On the 15th of June the plaintiffs presented the order of the 6th of June to Hackett, but were told that the flour had been burnt the preceding day. On the 16th of June the defendants were notified of Hackett's refusal to accept the order for the flour. It was proved that on the 8th or 9th of June the plaintiffs hesitated accepting the flour, the day for delivery having passed; but on the morning of the 12th of June plaintiffs paid the money and received the order of the 6th of June for the flour, which order had not been accepted by Hackett. *Held*, that a specific one thousand barrels of Peterboro' and Otonabee Mills flour having been deposited in the warehouse at Port Hope and appropriated to the plaintiffs, and the plaintiffs having paid the price thereof and

accepted the delivery order, the right of property therein passed to and vested in them, and that the property remained from that time at their risk. *Coleman v. McDermott*, 303.

2. S. being the owner of a certain raft, measured by the supervisor of cul-lers, and whose specification thereof Supple then had, sold the same to Gilmour under an agreement in the words following: "Sold Allan Gilmour & Co. a raft of timber now at Carouge, containing white and red pine, the quantity about 70,000 feet, to be delivered at Indian Cove booms; price for the whole, seven pence three farthings per foot; payments one-third cash, sixty and ninety days' date: John Supple, A. Gilmour & Co. Quebec, 20th October 1853." On the 24th of October the raft was taken in tow by a steam-tug; and as it approached the Indian Cove booms belonging to Gilmour an agent of Gilmour sent a messenger directing the raft to be towed around the long wharf, where he said there would be men and ropes to take charge of it: that it was towed round the long wharf, but there were neither men nor ropes of Gilmour's there to secure it; but the agent of Supple with his (defendant's) ropes tied the raft to the booms of Gilmour: that during the night the agent of Supple, being apprehensive that the raft was not properly secured, he represented that fact to the agent of Gilmour, who sent him to the foreman of Gilmour at the booms to have it safely secured: that the foreman and two other of Gilmour's men got ropes, &c., and as they thought securely fastened the timber: that later in the night the raft parted from the boom, and was scattered along the river and much of the timber lost, although a portion was saved by the servants of Gilmour, and at his expense. *Held*, that at the time of the loss the property was at the risk of Gilmour & Co. *Supple v. Gilmour*, 318.

DEMURRER.

'To debt on a judgment of the Superior Court of Lower Canada, defendant pleaded want of service of process, &c., want of knowledge of the proceedings of the plaintiffs in the said suit, and that at the time of the commencement of the action in which the said judgment was obtained he, the defendant, was and from thence hitherto continually hath been and still is resident without the jurisdiction of the said last mentioned court—to wit, at the city of Toronto, in the province of Upper Canada. *Held* bad on demurrer, on the ground that by the plea the defendant should have denied his being formerly resident or domiciled within the jurisdiction of the Court in Lower Canada, and his having real or personal property therein. *Gauthier v. Blight*, 122.

DOUBLE VALUE.

See LANDLORD AND TENANT.

DUTIES.

See CUSTOMS.

EASEMENT.

See TRESPASS.

Defendant, and those under whom he claimed, having the right to overflow the adjoining lands to an extent not exceeding ten acres, for supplying their mill with water, and which right had been exercised to a certain extent for twenty years or more, in trespass *quare clausum fregit* for entering the adjoining close—*Held*, that having the right to overflow a part of plaintiff's close, defendant had, as incident to that right, authority to enter and repair breaches in the natural state of the soil of the dam, but not to add thereto so as to cause additional overflow. *Held*, also, that the extent to which

such right could be maintained was that to which it was exercised during twenty years after such right accrued, and that a partial overflowing would not keep alive the right to extend the overflow at any time to the full extent of ten acres. *Ruttan v. Winans*, 379.

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ELECTOR.

Refusal of.—The refusal of an elector to take the oaths required by the returning officer, is a good ground for setting aside an election, if the relator would otherwise have had the majority. *Regina ex rel. Dillon v. McNeil*, 137.

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ENDORSER.

See PROMISSORY NOTE.

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ESTOPPEL.

R. being indebted to L. gave him a chattel mortgage and a confession of judgment to secure the amount: R., after the mortgage became due, made an assignment for the benefit of creditors to W. and S., who took possession of the goods: L. then put a writ of *Fi. Fa.* in the sheriff's hands, directing him to levy and make the amount of his debt out of the goods of R. *Held*, that the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mortgaged to him as the goods of R., did not estop him from setting up his title under the chattel mortgage. *Wakefield v. Lynn*, 410.

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EVIDENCE.

See TRESPASS, 2.—SHERIFF.

1. In an action of trover by plaintiff as administrator, when it appears that defendant had appropriated certain goods of the intestate, but had paid debts of the intestate to the amount of

the value of the goods so appropriated, which however was not pleaded—*Held*, after verdict for defendant, that the plaintiff was entitled to a verdict, as evidence of such payment was not admissible. The rule was, however, made absolute on terms. *Shipman v. Shipman*, 358.

2. In assumpsit for breach of promise of marriage the defendant is entitled to cross-examine the plaintiff's own witnesses respecting the general bad character of the plaintiff. *McGregor v. McArthur*, 493.

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FEME COVERT.

See HUSBAND AND WIFE.

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FORFEITURE.

To a declaration for calls under the 10th section of the 12 Vic. ch. 166, the defendant pleaded, that by reason of the non-payment of the said calls in the declaration mentioned, the said shares and each of them became forfeited in pursuance of the statute; and that defendant acquiesced in such forfeiture, of which plaintiffs had notice. *Held*, that such plea was bad in that it did not rest with defendant to forfeit the shares. *Ontario Insurance Company v. Ireland*, 135.

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FREIGHT.

Insurable interest in.—A party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel. *Orchard v. Aetna Insurance Company*, 545.

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GENERAL ISSUE PER STATUTE.

See CORPORATION—MUNICIPALITY.

GROWING CROPS.

By deed of conveyance of all and singular that certain parcel of land, &c., together with the houses and easements, profits, privileges, hereditaments, &c., to said parcel of land belonging or in anywise appertaining, and all the rents, issues and profits thereof, &c., growing crops in the ground at the time of the execution of the deed will pass to the grantee. *Wood v. Lang*, 204.

GUARANTEE.

In consequence of arrangements for uniting the Grand Trunk Telegraph Company with the British North American Association, the superintendent of the former company, on the 19th of December, 1854, wrote to its president and directors, expressing his "readiness (in order not to embarrass the company in its operations) to cease his connection with it on the 31st of December, 1854, on the company's guaranteeing to him the continuance of his salary at its present rate for six months from and after the 1st of January, 1855." On the same day the president wrote the following reply: "We are in receipt of your favor of this date upon the subject of your retiring from the office you now hold under us: we will be happy to meet you in the way set forth; and we hereby pledge ourselves to carry out the provisions mentioned in your behalf: signed, G. H. Cheney, president, on behalf of myself and the directors of the G. T. T. Company." *Held*, that the undertaking in the president's reply amounted to a personal guarantee: *Richards, J., dissentiente. Boyd v. Cheney*, 494.

HORSE RACE.

A trotting match for fifty pounds

between two horses driven in harness in sleighs on the ice is a legal horse race within the statutes 13 Geo. II. ch. 19 and 16 Geo. II. ch. 1. *Fulton v. James*, 182.

HUSBAND AND WIFE.

By patent of 22nd of May, 1773, lot No. 36 in the 6th concession Charlottenburg was granted unto the widow of Allan McDonell and her heirs, &c., 238 acres specially described. By will of 11th of December, 1802, Eleanor McDonell of Marysburgh devised to her brother in law, Archibald McDonell, one lot of land in Charlottenburg, 238 acres. It appeared in evidence that Kennedy was married to Helen, one of the daughters of Colonel and Eleanor McDonell and a niece of Archibald McDonell, and that Kennedy's wife survived him: that a conveyance was drawn from Archibald McDonell to Kennedy for half—seemingly the west half—of the lot: that by indenture of mortgage, dated 31st of October, 1835, Kennedy and Helen his wife conveyed to Angus McDonell, his heirs, &c., the west half of lot No. 36 in the 6th concession Charlottenburg, 100 acres in fee, to be void on payment of £150 in two payments on the 1st of October 1836 and 1837, which mortgage was not acknowledged by the feme covert as required by the statute 1 Wm. IV. ch. 2. *Held*, that the mortgage by Kennedy and wife to Angus McDonell was inoperative as to Kennedy's wife's share of the lot, not having been acknowledged by her as required by the statute 1 Wm. IV. ch. 2. *McGill v. Frazer*, 404.

IMPROVEMENTS.

See PAROL EVIDENCE, 1.

INSURABLE INTEREST.

See FREIGHT, 1.

LANDLORD AND TENANT.

In an action for distraining goods when no rent was due, and the case was left to the jury as an ordinary case, without being expressly left to them to find double damages, and without their being apprised of the provisions of the statute, the court refused to increase a verdict to double the value of the goods distrained. *Shipman v. Graydon*, 465.

LEASEHOLD LANDS.

Sale of.]—In debt on a lease it was proved that the plaintiff held under the last of several assignments of a yearly lease from the principal officers of Her Majesty's Ordnance. A judgment was obtained against the plaintiff, and his interest in the lot sold under a *Fi. Fa.* against goods and chattels. Plaintiff afterwards demised the said lot to defendant; and, on non-payment of rent, brought his action on the lease. *Held*, that the interest of plaintiff was a chattel interest, and might be sold under a *Fi. Fa.* against goods and chattels (see 7 Vic. ch. 11, sec. 7); and that the lease to defendant being made after such seizure and sale, plaintiff was not entitled to recover. *Sparrow v. Champagne*, 394.

LEASE.

Verbal assent to sub.let.]—In an action of ejectment for breach of covenant not to assign without license against the assignee of the lessee, the plaintiff's verbal assent to the assignment before defendant enters into possession is no defence to the action. *Carter v. Hibblethwaite*, 475.

LIBEL.

See NEW TRIAL, 5.

MANDAMUS.

See SCHOOL TRUSTEES.

MUNICIPALITY.

See BY-LAW.—CORPORATION.

Defendants, a municipal corporation, having passed a resolution to authorise the raising and levelling of a street within their jurisdiction, which was accordingly done, and plaintiff's premises overflowed thereby,—the plaintiff having been nonsuited on the ground that the defendants were authorised by statute to do what they had done,—the court set aside the nonsuit, and granted a new trial in order to ascertain whether in fact the work done constituted a repair of the street within the statute, or exceeded such a repair to the injury of the plaintiff's house and land. *Croft v. The Town Council of Peterboro'*, 35.

NEGLIGENCE.

See RAILWAY.

NEW TRIAL.

1. In an action on the case against the occupier of a mill for damage to the plaintiff's close occasioned by back water from defendant's dam, where the defence relied upon was a prescriptive right to back water for twenty years before action, and there being contradictory evidence as to such right, and the case having been tried by a special jury and occupying two days, the court refused to disturb a verdict for the plaintiff, and dis-

charged defendant's rule. *Holme v. Turner*, 116.

2. When the merits of a cause have been tried and decided upon by a jury under informal pleadings, and the party is entitled to sustain his verdict on the amendment of such informal pleadings, the court will decline granting a new trial. *Deady v. Goodenough*, 163.

3. In an action against a sheriff who was indemnified, and who had taken but little trouble with the defence, the court set aside a verdict for the plaintiff for a large amount, on the ground of the discovery of new evidence, the confiction of evidence at the trial, excessive damages, &c., on payment of costs, with leave to plaintiff to amend. *Townsend v. Hamilton*, 230.

4. That where in an action against a sheriff who has been indemnified, where there is conflicting evidence as to the plaintiff's right to recover as to a part of the goods seized, the court will grant a new trial to the plaintiff on payment of costs, he restricting himself to such goods alone at a future trial. *Townsend v. Hamilton*, 230.

5. In action for libel published in a newspaper against the plaintiff in his professional capacity as town engineer of, &c., where a verdict was rendered for the defendant on evidence preponderating greatly in plaintiff's favor, the court set aside such verdict, and granted a new trial, on payment of costs. *Peters v. Wallace*, 238.

6. That where there is conflicting evidence as to the rights of both parties, and, in the absence of the bills and papers referred to in evidence, the defendant was entitled to have a verdict for plaintiff set aside, the facts not being fully elicited on the trial. *Canniff v. Bogart*, 341.

NONSUIT.

See MUNICIPALITY.

NOTARY.

Certificate of.—A certified copy of a power of attorney to convey lands from the depository of notarial records in Lower Canada, under the corporate seal of the Board of Notaries of Montreal, Lower Canada, is admissible in evidence; it being presumed that such power of attorney, although not in itself an official document, came officially into the hands of the notary among whose records it was found. *Gray et al. v. McMillan*, 400.

NOTICE OF ACTION.

Defendants, as a municipal corporation deriving their power under the statute 12 Vic. ch. 81, authorised the raising and levelling of a street within their jurisdiction, which when done injuriously affected the plaintiff's property. *Held*, that if defendants were within the statute 14 & 15 Vic. ch. 54 and had pleaded the general issue per statute, they would have been entitled to notice of action. *Croft v. The Town Council of Peterboro'*, 141.

2. That when there is no by-law, and when the act complained of is done under the statutes 13 & 14 Vic. ch. 15, defendants are entitled to notice of action, coming as they do fully within the spirit of the protecting statute. *Reid v. The Corporation of the City of Hamilton*, 269.

3. A municipal council of a township is entitled to one month's notice of action under the statutes 14 & 15 Vic. ch. 54, sec. 2 and 12 Vic. ch. 10, sec. 5. *Barclay v. The Municipality of Darlington*, 432.

NOTICE TO EXAMINE

1. Plaintiff sued on a bond. At the trial of the case the witness to the bond was not forthcoming, but notice to appear had been served on the defendant under the statute 16 Vic. ch. 19: he not appearing, the learned judge who tried the cause declined taking it *pro confesso* against him. *Held*, that the whole case might have been taken *pro confesso*, and a verdict entered for the plaintiff. *McWhinney v. McQuaid*, 161.

2. A plaintiff or defendant in a suit may be called as a witness by his opponent in the same manner as any other witness. A party called as a witness under the statute 16 Vic. ch. 19 is not entitled to any other notice, or to be subpoenaed differently from any other witness. *Nash v. Bush*, 300.

NOTICE TO PRODUCE.

1. A notice to produce, served on plaintiff's attorney on the day of and within one hour of the trial, is too late to entitle the defendant to give secondary evidence. *Nash v. Bush*, 300.

PAROL EVIDENCE.

Admission of.]—A. by memorandum of agreement leased to B. a certain farm for four years, which B. agreed to work, &c.; and if said A. sold the farm he, B., would give up the farm in three months after receiving notice from said A., who, before his death, sold to C., from whom B. leased, and brought an action against the administratrix of A. for repairs done on the farm during A's. life, alleging that there was a verbal agreement that such improvements should be paid for by A. *Held*, that such action was not maintainable, there

being no stipulation in the lease as to improvements, and that plaintiff could not qualify or add to the written instrument. *Losee v. Kezar*, 234.

PLEAS AND PLEADING.

Argumentative denial.]—To a declaration on a promissory note by plaintiff as immediate endorser, defendant pleaded that a son of the payee was indebted to defendant; and that after the note became due the payee endorsed it in blank, and delivered it to his son, in order that he (the son), as the payee's agent, might settle with defendant and endorse thereon the amount due by the son to defendant; yet that the son, in fraud of payee, delivered it to plaintiff so endorsed and overdue. *Held*, that the plea was bad, as amounting to an argumentative denial of the endorsement alleged. *Chamberlain v. Chamberlain*, 340.

POWER TO SELL LANDS.

See TITLE.

Executors.]—In covenant by plaintiff's administrators against defendants, executors, &c., on a deed whereby defendants covenanted with plaintiff's intestate that they at the time of making such deed were the true, lawful and rightful owners of the land, &c., and then were seised in fee in their own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in the said lands, without anything to alter, change, charge or encumber the same. It appearing on the trial that the defendants claimed under a clause of their testator's will to dispose of any of the testator's lands in case it should be necessary for the purpose of liquidating any debt—*Held*, after verdict for plaintiff, that there should be a new trial, on

payment of costs, to enable defendants to prove the existence of debts of the testator, a fact material to maintain the sale. *Held* also, that if the power were well exercised, the estate passed to the heirs at law; and in that event the action was not maintainable by the executors, but by the heir at law. *MacDougall v. MacDonell*, 355.

PREScriptive RIGHT.

See EASEMENT.

PROCEEDINGS.

The word "proceedings" in the proviso to the 5th section of the statute 18 Vic. ch. 69, embraces proceedings both before and after judgment. *Ross v. Farewell*, 101.

PROMISSORY NOTE.

Defendant having endorsed in blank as security for the maker of a promissory note, payable to plaintiff, but not negotiable—*Held*, in an action against defendant as maker, that he was not liable as maker. *McMurray v. Talbot*, 157.

PROMISSORY NOTE.

Consideration of.—1. J. H. & Sons, a firm in Toronto, had been in the habit of drawing on their correspondent in England, and at first of covering such bills by shipments of flour, latterly by money remittances. In the fall of 1854, they had largely overdrawn their account, and their correspondent in England had been repeatedly requesting them to desist from drawing. In December, 1854 they drew several bills, which they sold or exchanged for promissory notes, and amongst others they obtained the note sued upon; this note they gave, with several others, in payment

of their account to G. H. & Co., and a few days after failed. The bill for which the note was given was returned dishonored for non-acceptance. T. H., the maker, resisted payment on the ground that it was procured from him by fraud and without consideration. *Held*, that there was evidence to go to the jury that the note had been procured by fraud: that if J. H. & Sons drew the bill for which the note was given, having no expectation or right to expect that it would be honored, they practised fraud in procuring the note which they took in exchange for the bill. *Gooderham v. Hutchison*, 241.

Lex loci contractus.—2. A promissory note, made in Upper Canada, for a sum payable in Glasgow, not adding the words, "and not otherwise or elsewhere," is a note payable generally; and that the plaintiff was not entitled to recover the difference of exchange on such note. *Wilson v. Aitkin*, 376.

RAILWAY.

1. In an action on the case for injury done to plaintiff's steers, defendants pleaded, that just before said time, &c., said steers were unlawfully depasturing in and upon certain lands adjoining the lands of defendants and said railway, which lands were not the lands of plaintiff but of one Richard Roe, who had not given license for the said steers to be there; and that the said steers strayed from the said lands where they were so unlawfully depasturing; and being as aforesaid upon the defendants' lands adjoining, and thence at the said time when, &c., on to the said railway, and then being so upon the said railway were accidentally injured, without any design or default of defendants. *Held* bad, on demurrer. *McDonnell v. The Great Western Railway*, 130.

Compensation by.—2. The Trunk Railway Company of under their acts of incorporation under authority of a by Municipality of Guelph, of road through and a Guelph, to which the applicant were adjacent. application for a mandamus Railway Company, that if the complained of amounted to a public nuisance, it would not be a case for private compensation; and that if authorised by law, that the works did not injuriously affect the applicant within the meaning of the fourth section of the statute 14 & 15 Vic. ch. 51. *Day v. The Grand Trunk Railway Company*, 420.

RECORD.

When evidence.—In an action for malicious arrest, the plaintiff attempted to put in evidence the original record in the suit of the present defendant against the present plaintiff, with the verdict of the jury in this plaintiff's favor endorsed thereon. *Held*, such record was inadmissible in evidence. *Daly v. Leamy*, 375.

SCHOOL TRUSTEES.

Upon an application for a rule *Nisi* for a mandamus by the teacher of a school section against the trustees of such section, requiring them to levy a rate sufficient to pay the applicant the balance of his salary as such teacher, recovered in the Division Court against former trustees, the court refused to grant such rule, it not appearing on the application when, for how long, and by whom the said teacher was employed. *O'Donohoe v. The School Trustees of Thorah*, 297.

SECONDARY EVIDENCE.

See NOTICE TO PRODUCE.

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section of the statute go to the jury
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Held, that a bill of sale
conveying the interest of a
debtor in ship or vessel to the
chaser, without reciting the certificate
of ownership and without the endorsement
on the bill of sale required by the
act, is valid. *Smith v. Jones*, 425.

SHERIFF.

Sale for taxes.—See "Taxes"—
"Trespass."

SHIP'S REGISTRY.

A foreign-built ship or vessel cannot be registered in this province. *Smith v. Jones*, 425.

STOCK.

Call for.—A call of four per cent. on the first instalment of five per cent. on the capital stock of the Ontario Insurance Company, made by a quorum only, and not by a majority of the directors, is a good call under the ninth section of the statute 12 Vic. ch. 166,—the act of incorporation. *Ontario Insurance Company v. Ireland*, 139.

STOCKHOLDER.

In an action of debt under the 19th

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payment of costs, *ante* 14 & 15 Vic. ch. to prove the existence of a stockholder as a stockholder, a fact. *Held*, that as a stockholder, the sale of the company, it is incumbent upon the heirs of the company to shew an execution of the company returned unsatisfied that it was not in plaintiff's hands by any reasonable exertion to obtain satisfaction. *Held*, also, that the making of calls by the directors is not a condition precedent to the plaintiff's right to recover, and that the remedy given by the statute may be pursued by a single creditor. *Moore v. Kirkland*, 452.

TAXES.

Sale of lands for.—1. The east and west halves of lot No. 1 in the second concession of Mono, each containing 100 acres, were granted by the Crown at different times respectively in 1823 and 1829, and to different persons. The taxes being in arrear, lots numbers 1 & 2 were returned by the treasurer of the then Home district as in arrear for eight years' taxes, being £6 10s. (the taxes on 400 acres for eight years), without distinguishing that one portion of these taxes was upon lot No. 2 and another portion upon No. 1, or the separate halves of No. 1. The lands were advertised by the treasurer as in arrear for taxes under the statute 59 Geo. III. ch. 7—the assessment law then in force—in these words, "lots 1 and 2 in the 2nd concession west of Hurontario street, in the township of Mono, £6 10s." In the writ issued to the sheriff for levying the taxes the sheriff was directed to levy in respect of lots Nos. 1 & 2, £6 10s., in the same language as that used in the advertisement. The sheriff, at an adjourned sale under that writ, held on the 5th of January, 1842, put up the whole of lot No. 1 for the sum of £3 12s. 6d., being £3 5s. the eight year's arrears

of taxes for 200 acres, and 7s. 6d. the expenses of the sale; and for that sum 25 acres, portion of the east half was sold. *Held*, that under the facts the sale was void, for that as a portion of the east half had been sold for taxes part whereof had accrued upon the west half and was not chargeable on the east half; and as there were no means of apportionment, it was void as to all. *Ridout v. Ketchum*, 50.

Assessment of unoccupied lands of non-residents.—2. A non-resident owner of lands can only be rated on the assessment-roll by name at his own request. *Municipality of Berlin v. Grange*, 211.

Mode of collecting.—3. The taxes due on lands of non-residents cannot be sued for as a debt until they have been five years in arrear, and cannot be realized by a sale of the lands in manner provided for in the act. *Municipality of Berlin v. Grange*, 211.

TRESPASS QUARE CLAUSUM FREGIT.

1. By indenture of bargain and sale, one Jacob Miller conveyed to plaintiff the south-east quarter of lot No. 18 in the 5th concession of Markham, reserving the privilege of a road two rods wide through to the south-west quarter of the same lot, which he afterwards conveyed with the right of way reserved. In an action of trespass *quare clausum fregit* against the owner of the south-west quarter and his workmen, for breaking and entering plaintiff's close, which was a lane nearly two rods wide leading from defendant's lot through plaintiff's premises—*Held*, that defendant might justify under a grant of right of way, and that the lane upon which the trespasses were said to have been committed having existed of nearly the same width as that described in

the grant for a long time, that the reasonable construction was, that the grant of the right of way was meant to apply to that lane as the way granted. *Miller v. Anderson*, 458.

By sheriff.—2. In trespass against the sheriff and A. & B., plaintiff claiming the goods under a bill of sale, proved that the sheriff's bailiff, under a writ of *Fi. Fa.* at the suit of another creditor, seized the goods and sold them; and after paying the amount of that execution, paid the balance to A. & B. on account of their execution. *Held*, after verdict for plaintiff, that the execution creditors A. & B. could not be made trespassers by relation or adoption of the sale under such prior execution, and that there being no proof that the sheriff himself did anything, nor the writs produced or any warrant to the bailiff, that the verdict was not sustained by proof, and that there should be a new trial without costs. *Tilt v. Jarvis et al.*, 486.

3. The plaintiff had workmen attending a certain steam-mill: defendant being interested in getting saw-logs cut up, removed plaintiff's fireman and placed another man in his stead, also several of defendant's own workmen were added to those employed by the plaintiff: owing to some mismanagement, the boiler burst. At the trial the plaintiff was nonsuited for want of evidence of trespass. A rule *Nisi* was obtained to set aside the nonsuit. *Held*, that there was

sufficient evidence to go to the jury that defendant was a trespasser: that whether he was responsible as such for the injury done to the boiler, depended on the nature and extent of his influence, and how far he was implicated as a particeps in the acts which caused the explosion. *Eligh v. Winters*, 491.

WAREHOUSE RECEIPTS.

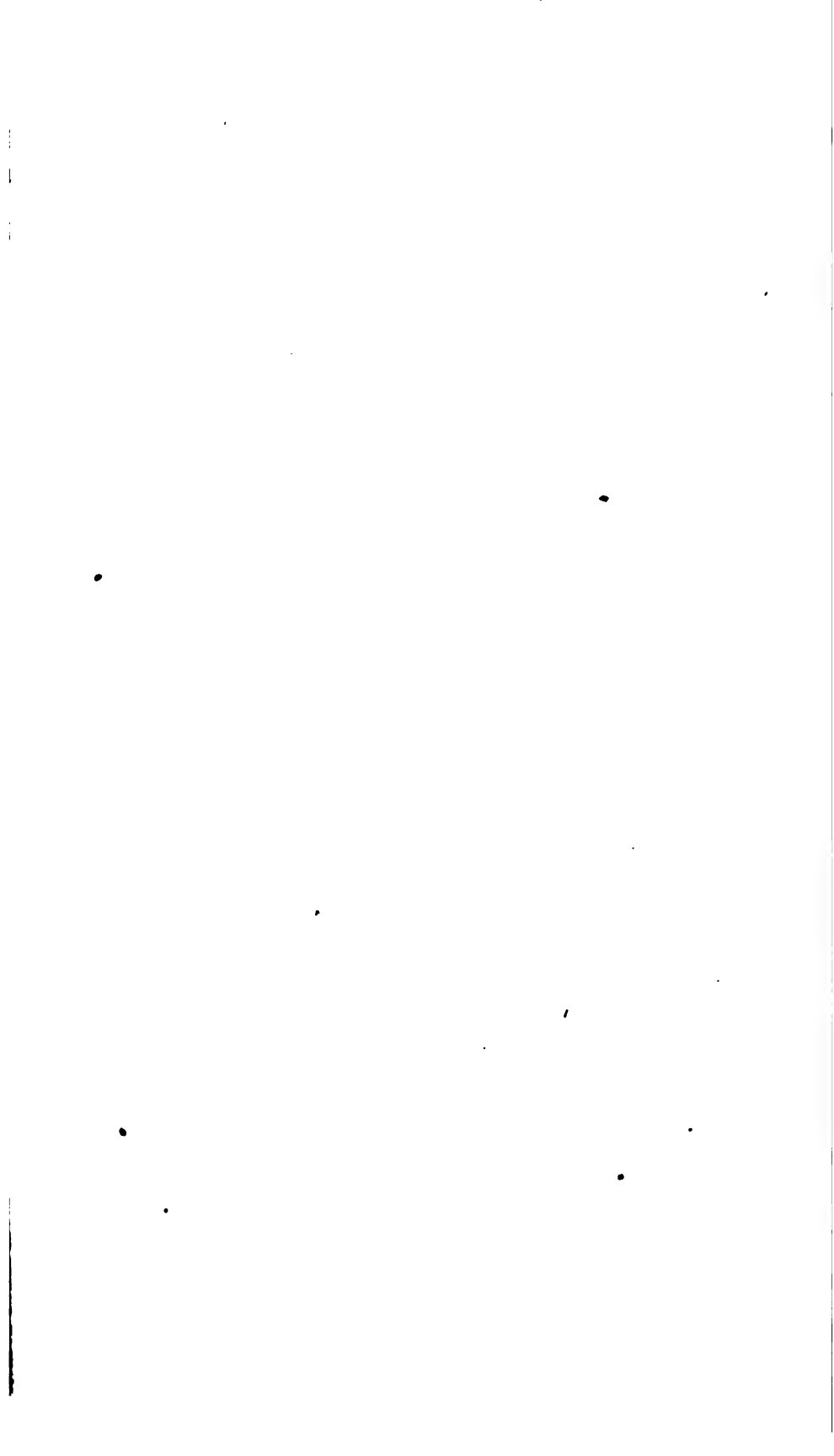
Delivery of.—The delivery of warehouse receipts for flour, and the delivery of orders therefor, is not a constructive delivery of possession of the flour. *Deady v. Goodenough*, 163.

WAY.

Right of.—See "Trespass," 1.

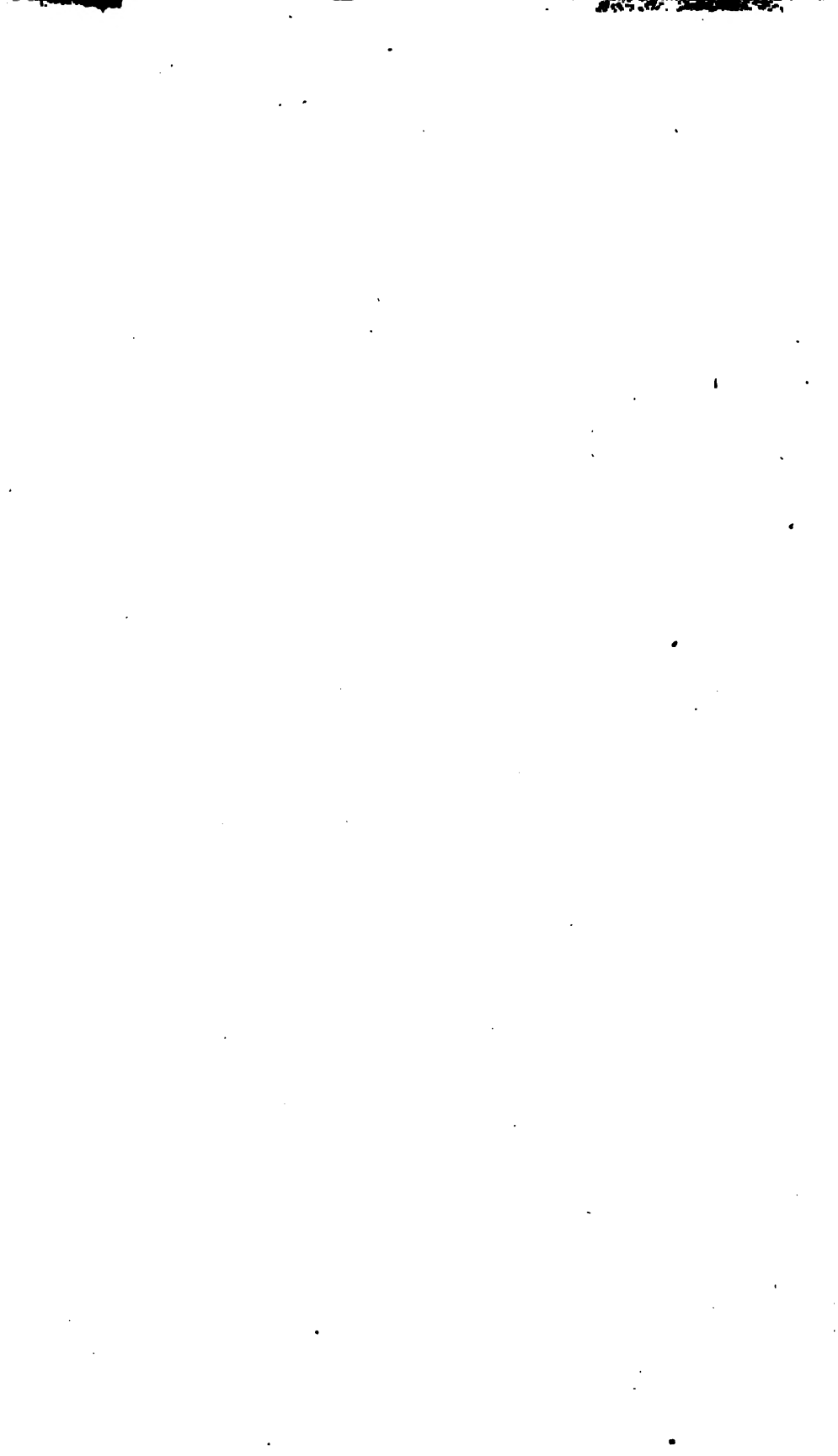
WILL.

Construction of.—A. by will devised as follows: "I give and bequeath to my wife, after my decease, the proceeds of one-half of all my lands, cattle and other effects of every kind whatsoever to me belonging at the time of my decease; and the other half of my said lands, cattle and effects of every kind whatsoever, I leave in the hands of my executrix and executors, to pay all my just debts, &c." *Held*, that by such devise the estate passed to the executors to sell, and did not confer only a mere power to sell. *Dowling v. Power*, 480.









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